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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, PETITIONERS

v.

CLACKAMAS COUNTY, OREGON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on October 21, 1954.

OPINIONS BELOW

The district court did not write an opinion. The majority and dissenting opinions of the court of appeals dated April 30, 1954 (Appendix A, *infra*, pp. 1a-42a), and the opinion of the court of appeals

dated October 21, 1954 (Appendix A, *infra,* pp. 43a-47a), have not been reported.

JURISDICTION

The judgment of the court of appeals reversing the judgment of the district court, was entered on April 30, 1954 (Appendix A, *infra,* pp. 48a-49a). The orders of the court of appeals denying a timely petition for rehearing, refusing to vacate its judgment, and refusing to remand the case for dismissal as moot were entered on October 21, 1954 (Appendix A, *infra,* pp. 50a-52a). On January 14, 1955, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 18, 1955 (Appendix A, *infra,* p. 50a). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTION PRESENTED

Whether the enactment of the Act of June 24, 1954, 68 Stat. 270—whereby Congress determined both the future administration and the distribution of funds derived from certain lands in Oregon—and payment by the United States under that Act rendered moot an action in the nature of mandamus which had been brought to compel the Secretary of the Interior to assume jurisdiction over lands of the United States which are being administered by the Secretary of Agriculture as forest reserve lands pursuant to various Presidential proclamations; to compel the Secretary of the Interior to distribute funds—which were on deposit in the Treasury and arose from the sale of timber from such lands—in accordance with the provisions of

a predecessor Act of Congress, as construed by respondent; and to enjoin the Secretary of Agriculture from asserting any claim to jurisdiction over the lands involved.

STATUTES INVOLVED

The pertinent section of the Act of June 24, 1954, 68 Stat. 270-271, provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) those unselected and unpatented odd-numbered sections within the indemnity limits of the Oregon and California Railroad land grant authorized by the Act of July 25, 1866 (14 Stat. 239), as amended by the Act of April 10, 1869 (16 Stat. 47), and for which payment was made by the United States to such railroad or its successors in interest under the Act of June 9, 1916 (39 Stat. 218), pursuant to the decree in the case of United States against Oregon and California R. R. Co. (8 F. (2d) 645), which were included within the boundaries of national forests by proclamations of the President of the United States issued under the dates of June 17, 1892, September 28, 1893, October 5, 1906, January 25, 1907, March 1, 1907, and March 2, 1907, are hereby declared to be revested Oregon and California railroad grant lands; and said lands shall continue to be administered as national-forest lands by the Secretary of Agriculture subject to all laws,

rules, and regulations applicable to the national forests: *Provided,* That all revenues hereafter derived from said lands and those revenues heretofore derived from such lands and placed in special deposit by agreement between the Secretary of Agriculture and the Secretary of the Interior shall be disposed of in accordance with the provisions of title II of the Act approved August 28, 1937 (50 Stat. 874) as hereby amended, and said lands shall not hereafter be subject to the provisions of any other laws or parts of laws which otherwise prescribe the disposal or distribution of receipts from lands of the United States, except that none of the provisions of this Act shall affect revenues heretofore distributed. No part of said lands or the resources thereof shall be subject to exchange under the provisions of this or any other law applicable to national-forest lands or otherwise.

(b) Subsection (a) of title II of the Act approved August 28, 1937 (50 Stat. 874), is amended by adding at the end thereof the following proviso: " : *Provided, however,* That for the purposes of this subsection the portion of the said revested Oregon and California railroad grant lands in each of said counties which was not assessed for the year 1915 shall be deemed to have been assessed at the average assessed value of the grant lands in said county."

The provisions of Title II of the Act of August 28, 1937, 50 Stat. 874, 875-876, prior to the above-quoted 1954 amendment, appear in Appendix B, *infra*, pp. 53a-55a.

STATEMENT

The facts in this case may be summarized as follows: In November, 1952, Clackamas County, Oregon, filed an action in the District Court for the District of Columbia in the nature of mandamus (a) to compel the Secretary of the Interior to assume jurisdiction over certain lands of the United States in Oregon which are being administered by the Secretary of Agriculture as forest reserve lands pursuant to various Presidential proclamations; (b) to compel the Secretary of the Interior to distribute funds arising from the sale of timber from such lands which are on deposit in the Treasury of the United States in accordance with the Act of August 28, 1937, 50 Stat. 874 (Appendix B, *infra*, pp. 53a-55a); and (c) to enjoin the Secretary of Agriculture from asserting any claim to jurisdiction over the lands involved (R. 2-15).

The lands in question were within the "lieu limits" of grants of public lands in the 1860's and early 1870's to the Oregon and California Railroad Company.[1] They were never selected or patented. By various Presidential proclamations

[1] The railroad company was granted each odd numbered section within 10 miles on each side of its right of way. To the extent that any of such lands were preempted the railroad company was given the right to select equivalent lands in the "lieu limits" which included the odd numbered sections extending another 10 miles on each side of the road.

issued during the period 1893-1907 the lands were made part of the national forests. In 1915, this Court decided that the railroad company had not lived up to the terms of the grant, and, therefore, enjoined any further land sales by the railroad company until Congress had an opportunity to pass appropriate further legislation respecting the grant. *Oregon & California R. R.* v. *United States,* 238 U.S. 393, 438.

By the Act of June 9, 1916, 39 Stat. 218, Congress revested title to all the lands which had not been sold by the railroad company prior to July 1, 1913, in the United States, and Congress has provided that the proceeds from these lands shall be placed in an "Oregon and California" fund ("O & C" fund or account) for distribution at the rate of 75% to some 18 counties in Oregon (Act of August 28, 1937, 50 Stat. 874, 875-876; Act of July 13, 1926, 44 Stat. 915, 916; Act of June 9, 1916, 39 Stat. 218, 222-223).

In view of the prior reservations and long administration of the some 462,000 acres of land here involved as national forest lands, these lands were not administratively considered "O & C" lands. Accordingly, the proceeds therefrom were distributed pursuant to the statutes governing the disposal of money received from national forests (16 U. S. C. 499-501) under which the counties receive 25%, rather than being distributed as "O & C" monies.

The Oregon counties contended, however, that the lands in question should be considered "O &

C" lands. In 1939, the Department of the Interior changed its earlier view and adopted the position of the Oregon counties. Hearings, H. Committee on Public Lands, H. R. 1688 and S. 275, 78th Congress, 1st and 2d sessions (1943-1944), pp. 227-229. Because of the serious dispute which developed between the Department of Agriculture and the Department of the Interior as to which of the two statutes governed the distribution of the proceeds from timber sales from the lands, the suspense account involved in this litigation was established, Congress being advised of it. *Ibid.*, pp. 247-248, 387.[2] During the course of the controversy the Attorney General considered the matter and concluded that disturbance of the continued administration of the lands by the Department of Agriculture was not warranted under the existing law; the Comptroller General considered the matter and ruled that distribution of the funds in the special suspense account would not be warranted pending the ultimate clarification by Congress as to the disposition of receipts from the controverted lands; and Congress debated the matter over a period of many years in connection with some 15 bills introduced on the subject (R. 79-86).

In the present action, the defendant Secretaries

[2] The full history of the controversy is set out in the legislative history of many bills on the subject. See e.g., 2 Hearings, S. Committee on Public Lands and Surveys, S. 275, 78th Congress, 1st session (1943), (including reports by the Department of the Interior and the Department of Agriculture (*ibid.*, pp. 119-178)); Hearings, H. Committee on Public Lands, H. R. 1688 and S. 275, 78th Congress, 1st and 2nd sessions (1943-1944).

filed a motion to dismiss the complaint on the grounds that it fails to state a claim upon which relief can be granted, that the action is a suit against the United States which has not consented to be sued, and that the United States is an indispensable party defendant (R. 16). The district court granted that motion (R. 32). Clackamas County appealed (R. 33-34).

Though the dismissal of the complaint had been on jurisdictional grounds prior to any answer having been filed on behalf of the two Secretaries, the court of appeals, Judge Edgerton dissenting, handed down a decision (Appendix A, *infra*, pp. 1a-42a), on April 30, 1954, in which it considered what it conceived to be the facts with respect to the merits of the case (which had been presented to neither trial nor appellate court) and directed the district court to issue a mandatory directive to the Secretary of the Interior and a mandatory injunction to the Secretary of Agriculture (*infra*, p. 40a). The duties of the Secretaries in the matter were held to be so clear as to be ministerial and therefore subject to mandamus.

A petition for rehearing was filed on behalf of the two Secretaries on the grounds that (a) the judgment of the court of appeals directed an action which was premature in view of the status of the case; (b) the judgment directed is inconsistent with and contradictory to the reasoning by which the result was reached; and (c) the opinion itself recognized the absence of a ministerial duty to ad-

minister the lands involved as "O & C" lands (R. 76-86).

While the petition for rehearing was pending before the court of appeals, Congress enacted the Act of June 24, 1954, 68 Stat. 270, *supra*, pp. 3-4, which determines both the future administration of the lands and the distribution of the funds in controversy. As will be more fully demonstrated below, this Act directly impinges upon the very subject matter of the suit by Clackamas County. Thereafter, the 17 Oregon counties involved, other than Clackamas County, filed a motion to intervene for the purpose of suggesting mootness and a motion to vacate the judgment and remand the case for dismissal as moot (R. 92). On behalf of the Secretaries, a similar motion was filed to vacate judgment, withdraw opinion, and remand the case for dismissal as moot (R. 91, 95).

On October 21, 1954, the court of appeals, Judge Edgerton taking no part, filed a memorandum embodying its rulings on the petition for rehearing and the motions which had been filed following the enactment of the Act of June 24, 1954. The court of appeals (a) acknowledged the prematurity of the action which it had directed in its opinion of April 30, ordered stricken the judgment paragraph of that opinion, and substituted a new paragraph reading "The judgment of the District Court will be reversed and the case remanded for further proceedings not inconsistent with this opinion"; (b) denied the petition for rehearing; (c) denied the motion to dismiss as moot; (d)

denied the motion by the 17 counties to intervene; and (e) granted various motions by Clackamas County to file certain papers (Appendix A, *infra*, pp. 43a-52a).

Counsel for the 17 counties filed a motion for leave to file a motion for reconsideration on the grounds that the court overlooked an important feature of the 1954 Act, *i.e.*, that the distribution formula is changed from what it was under the 1937 Act, and that the 17 counties are entitled to intervene as of right. On November 19, 1954, the court of appeals entered its order granting the motion for leave to file the motion for reconsideration but on December 7, 1954, the court denied the motion.

The funds which were being held in the special deposit account have been distributed as directed in the 1954 Act except for the amount of $800,000.00 which has been withheld from distribution only because of an independent suit filed by attorneys for respondent in which they seek the award of attorney's fees payable out of the special deposit fund (*A. W. Lafferty and Richard L. Merrick* v. *George M. Humphrey, et al.*, D.C. D.C. No. 2561-54).[3]

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[3] The fund available for distribution as of June 30, 1954, to which date receipts from the land in question have become payable (50 Stat. 874, 68 Stat. 270), amounted to $7,695,498.12, seventy-five percent of which is payable under the 1954 Act to the 18 Oregon counties involved. Of the $800,000.00 withheld, the counties' share is $600,000.00 and the Government's share is $200,000.00.

The amount withheld will also be distributed at any time that respondent's attorneys withdraw their demand or other

REASONS FOR GRANTING THE WRIT

1. As pointed out in the Statement, respondent seeks a judgment (a) to compel the Secretary of the Interior to assume jurisdiction over lands of the United States which are being administered by the Secretary of Agriculture as forest reserve lands pursuant to various Presidential proclamations; (b) to compel the Secretary of the Interior to distribute funds arising from the sale of timber from such lands in accordance with the Act of August 28, 1937, 50 Stat. 874; and (c) to enjoin the Secretary of Agriculture from asserting any claim to jurisdiction over the lands involved (R. 2-15).

With respect to (a) above, the Act of June 24, 1954, section 1(a), specifically provides that "said lands shall continue to be administered as national-forest lands by the Secretary of Agriculture * * * " *supra*, p. 3. As to (c), the same provision of the 1954 Act precludes any judgment.

With respect to (b), the 1954 Act so changed

satisfactory arrangement can be effected such as a proposed agreement with counsel for the 17 other counties. Counsel for petitioners have been seeking to obtain the agreement of all the Oregon counties involved, and their counsel, that, without prejudice to the merits of their positions in the attorneys' fee dispute, any attorneys' fees which may be awarded in connection with this matter will be payable from the counties' share of future receipts from the lands involved so that disbursement of all funds now payable can be prudently made. To date the proposed agreement has not been concluded. On January 14, 1955, a suit was filed on behalf of the 17 counties (other than Clackamas County) which seeks to compel the petitioners herein to make complete disbursement of all funds now available for distribution as provided by the 1954 Act (*Benton County, Oregon, et al.* v. *Douglas McKay, et al.*, D.C. D.C. No. 175-55).

the distribution formula, and actions taken in compliance with the 1954 Act have so changed the factual situation, that the relief sought in the complaint would now be entirely inappropriate. The Act of June 24, 1954, section 1(a), provides *supra* p. 4, "That all revenues hereafter derived from said lands and those revenues heretofore derived from such lands and placed in special deposit by agreement between the Secretary of Agriculture and the Secretary of the Interior shall be disposed of in accordance with the provisions of title II of the Act approved August 28, 1937 (50 Stat. 874) as hereby amended, * * * ". Title II of the 1937 Act was amended by section 1 (b) of the 1954 Act as follows:

> (b) Subsection (a) of title II of the Act approved August 28, 1937 (50 Stat. 874), is amended by adding at the end thereof the following proviso: ":*Provided however,* That for the purposes of this subsection the portion of the said revested Oregon and California railroad grant lands in each of said counties which was not assessed for the year 1915 shall be deemed to have been assessed at the average assessed value of the grant lands in said county".

The revested grant lands "not assessed for the year 1915" referred to in this subsection are the identical 462,000 acres of land which are involved in this case and which long had been considered national forest lands. Since that land was not previously included in calculating the distribution made under

the 1937 Act—based on the proportion of the assessed value of the "O & C" land in each county to the total assessed value of all "O & C" land in the state—the inclusion of the 462,000 acres in that calculation, as directed by the 1954 Act, results in different payments to the counties under the 1954 Act than under the provisions of the 1937 Act.[4] Within the proper limits of the judicial function it would be impossible to hold that payments to the counties under the 1954 Act would be the same as

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[4] It is clear that Congress has the authority to alter the distribution of undisbursed money derived from the sale of timber from lands belonging to the United States and, since the provisions for payments to the counties represent a gratuity, they created no vested interest. *Maricopa County* v. *Valley Bank*, 318 U.S. 357, 361-362; *Lynch* v. *United States*, 292 U.S. 571, 577; *Haskins Bros. & Co.* v. *Morgenthau*, 85 F. 2d 677, 685 (C.A. D.C.), certiorari denied, 299 U.S. 588; *Kemp* v. *Day & Zimmerman, Inc.*, 239 Iowa 829, 861, 33 N.W. 2d 569, 586. The liability for payments to the respondent was "created by a law of the legislature and can be withdrawn or limited at its pleasure." *Louisiana* v. *Mayor of New Orleans*, 109 U.S. 285, 287; *United States* v. *Weekly Publications*, 144 F. 2d 186, 188 (C.A. 2). In short, Congress does not stultify itself in the administration of government-owned lands whenever it decides that a portion of the proceeds from such lands are to be paid to the state wherein they lie.

There can, of course, be no substantial question raised as to the authority of Congress to make such disposition as it sees fit concerning such lands of the United States and the proceeds therefrom. U. S. Const., Art. IV, sec. 3, cl. 2; *Alabama* v. *Texas*, 347 U.S. 272, 273-274; *Gibson* v. *Chouteau*, 13 Wall. 92, 99. Indeed, an action by Clackamas County, Oregon, attacking the constitutionality of section 1(a) of the Act of June 24, 1954, 68 Stat. 270, was dismissed December 2, 1954, on the ground that the complaint raises no substantial constitutional question. *Clackamas County, Oregon* v. *Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture* (D.C. D.C. No. 3939-54). Clackamas County has noted an appeal.

under the 1937 Act because of the amendment's new requirement that the 462,000 acres shall be assigned an assessed value as a factor in the distribution formula. Pursuant to the requirements of the 1954 Act, the Secretary of Agriculture transferred the funds theretofore held in the special Forest Service suspense account referred to in the 1954 Act to the Secretary of the Interior for disbursement under the formula provided by the 1954 Act, and the Secretary of the Interior has proceeded to make distribution as therein required with the exception noted, *supra,* page 10.

2. For these reasons, it is submitted that the 1954 Act, and payment thereunder, have rendered this case moot in every respect. The 1954 Act now controls, and all action must now be taken, and payments made, under that Act. The 1937 statute, which was the original foundation of this suit, has been amended and superseded by the 1954 legislation and can no longer govern.[5]

Thus, the situation is that the provisions under which the action was brought are "no longer in force, and it is to the new provision that" petitioners "must give effect." *Public Util. Commrs. v. Compañia General,* 249 U.S. 425, 426. As this Court concluded: "In this situation we are not called upon to consider the propriety of the judgment below, the proper course being, as is shown by many precedents, to reverse the judgment and

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[5] The new action referred to in fn. 3, *supra,* in no way affects the fact that the instant action has been rendered moot by the Act of June 24, 1954, 68 Stat. 270, and payment thereunder. Indeed, the new action points up that fact.

remand the cause with a direction that it be dismissed * * *". (249 U.S. at 426-427).

The same rule applies to actions for mandatory relief. "In such circumstances there can be no effectual relief by mandamus and the Court of Appeals should have remanded the cause with directions to dismiss the petition as moot." *Norwegian Co.* v. *Tariff Comm.*, 274 U.S. 106, 112. This is clearly so here where the very Act under which respondent sought relief has been amended and the very fund which it sought to have distributed has been disbursed under the specific new and different legislative directive by the Congress. Insofar as the court of appeals relied on the fact that the fund had not at the time of its ruling actually been distributed (Appendix A, *infra*, p. 45a), that basis for refusing to vacate the judgment and remand with a direction to dismiss as moot has now been eliminated.

The remaining reasons given by the Court of Appeals for refusing to remand the case for dismissal as moot are patently without merit. The court stated: "It is not alleged, and it does not appear that the amendments to the 1937 Act made by Public Law 426 [the 1954 Act, 68 Stat. 270] changed the distribution directed by the 1937 Act" (Appendix A *infra*, p. 45a). But, as shown above, section 1 of the 1954 Act does change the distribution (*supra*, pp. 11-14). The court of appeals also said that "The judgment of this court was that it was and is the duty of the Secretaries to comply with the 1937 Act, and that they could and should

be required to do so" (Appndix A, *infra,* pp. 44a-45a). The respondent, however, seeks, on the basis of the 1937 Act, to bar the Secretary of Agriculture from administering the land and to require the Secretary of the Interior to administer the land. The 1954 Act directs precisely the opposite result (*supra,* pp. 3-4, 11).

When a case has been rendered moot, this Court has held it to be "the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss". *Duke Power Co.* v. *Greenwood County,* 299 U.S. 259, 267; *United States* v. *Munsingwear,* 340 U. S. 36, 39-40. Simply remanding for further proceedings in the district court, as the judgment of the court of appeals now provides, leaves the case in an anomalous position. The situation having been entirely altered by the new legislation and payments, petitioners would simply have to advance in the district court their position that the case is now moot. If the district court refused to so hold—which would be likely in view of the fact that the court of appeals has passed on the issue—petitioners would have to appeal that decision anew to the court of appeals. As this Court has made clear, where a controversy has become moot it "is no longer a subject appropriate for judicial action" (*Brownlow* v. *Schwartz,* 261 U.S. 216, 219; *United States* v. *Anchor Coal Co.,* 279 U.S. 812, 813), and litigation should be ended at once.

3. It should also be noted that this Court has stated as a reason for remanding moot cases for

dismissal that such procedure "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *United States* v. *Munsingwear,* 340 U.S. 36, 40. Absent the Act of June 24, 1954, the Government might well have sought to have reviewed the original decision of the court of appeals since its opinion and ruling seem to us inconsistent with numerous decisions by this Court concerning the granting of mandatory relief. The court of appeals held that the Secretary of the Interior was under a *ministerial* duty to distribute the suspended funds under the 1937 Act, although two Executive Departments have debated at length whether the controverted lands were properly to be administered as national forest lands or as "O & C" lands, although the Attorney General had considered the matter and concluded that disturbance of the continued administration of the lands by the Department of Agriculture was not called for, although the Comptroller General had ruled that distribution of the funds in the special suspense account was not warranted pending clarification by Congress, and although Congress itself had been debating the proper status of the lands over a period of many years.[6] It is rare that a more controversial matter is presented. In our view, the situation presented to the court was plainly not "free from doubt" nor "equivalent to a positive command", and mandamus was not proper. *Wil-*

[6] Details and citations appear in petition for rehearing filed by petitioners herein in the court of appeals (R. 76-86).

bur v. *United States,* 281 U.S. 206, 218; *United States* v. *Wilbur,* 283 U.S. 414, 420.[7] It is therefore particularly appropriate to apply established procedure which "eliminates a judgment" of that caliber, the "review of which was prevented through happenstance" (340 U.S. at 40).

4. Though this Court has made clear that anticipation of future difficulties does not preserve the justiciable quality of a case which has been rendered moot (*Commercial Cable Co.* v. *Burleson,* 250 U.S. 360, 362), to allay any apprehension which respondent may have, we suggest that the judgment of the court of appeals should be reversed or vacated and the case remanded for dismissal as moot without prejudice to the rights of the respondent in the future with respect to any actual issue which may possibly develop under the present law. Cf. *United States* v. *Hamburg-American Co.* 239 U.S. 466, 478; *United States* v. *Alaska S. S. Co.,* 253 U.S. 113, 116; *Hammond Clock Co.* v. *Schiff,* 293 U.S. 529, 530; *O'Ryan* v. *Mills Novelty Co.,* 292 U.S. 609. A grant of certiorari accompanied by a reversal or vacating of the judgment of the Court of Appeals

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[7] Since the instant case is not properly within the ministerial-duty exception to the doctrine of sovereign immunity, it clearly becomes a suit against the United States, despite the contrary holding of the court below, since the law is well settled that a suit which affects property or property rights of the United States or in any way seeks to interfere with the use and disposition by the United States of its property is a suit against the United States. *Naganab* v. *Hitchcock,* 202 U.S. 473, 475-476; *Morrison* v. *Work,* 266 U.S. 481, 485-486; *Mine Safety Appliances Co.* v. *Forrestal,* 326 U.S. 371, 374-375; *Larson* v. *Domestic & Foreign Corp.,* 337 U.S. 682, 703-704.

and a remand of the cause to the district court with directions to vacate the order appealed from and to dismiss the proceeding as moot would be an appropriate disposition of the case. See e.g., *Montgomery Ward & Co.* v. *United States,* 326 U.S. 690; *Leader* v. *Apex Hosiery Co.,* 302 U.S. 656; *Bracken* v. *Securities & Exchange Comm'n.,* 299 U.S. 504; *First Union Trust & Savings Bank, Trustee* v. *Consumers Co.,* 290 U.S. 585; cf. *Garcia* v. *Landon,* 348 U.S. 866; *Harris* v. *Battle,* 348 U. S. 803, 889; *Sawyer* v. *Dollar,* 344 U.S. 806.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted and the case remanded for dismissal as moot.

SIMON E. SOBELOFF,
Solicitor General.

FEBRUARY, 1955.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11844

CLACKAMAS COUNTY, OREGON, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, APPELLANT

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided April 30, 1954

Messrs. A. W. Lafferty and *Richard L. Merrick* for appellant.

Mr. Harold S. Harrison, Attorney, Department of Justice, with whom *Mr. Roger P. Marquis,* Attorney, Department of Justice, was on the brief, for appellees. *Mr. Leo A. Rover,* United States Attorney, *Mr. Lewis A. Carroll,* Assistant United States Attorney, and *Mr. William J. Peck,* Assistant United States Attorney at the time the brief was filed, entered appearances for appellees.

Before EDGERTON, WILBUR K. MILLER, and PRETTYMAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is a civil action brought in the United States District Court for the

District of Columbia by Clackamas County, Oregon, on behalf of itself and seventeen other so-called land grant counties in that State, seeking a *mandamus* directed to the Secretary of the Interior and an injunction to the Secretary of Agriculture.

The controversy concerns the proceeds from the sale of timber from 472,000 acres of public land. This is part of a large tract which has been the subject matter of several acts of Congress and has also been involved in other litigation. There is now on deposit in the Treasury of the United States some $5,000,000 in cash from the sales of the timber on these 472,000 acres. Our appellant, Clackamas County, contends that these moneys should be distributed to it and the other seventeen counties under a specific mandate of the Congress, that the Secretary of the Interior fails and refuses to make such distribution, and that the Secretary of Agriculture is a party to an interdepartmental agreement with the Secretary of the Interior that these proceeds should be withheld from distribution. The Secretaries say (1) that this is a suit against the United States, to which it has not consented, and (2) that the actions sought to be compelled involve discretionary matters which may not be controlled by mandatory injunction. The controversy has a long history.

Because this opinion will be lengthy, we have indicated its subdivisions by the use of numbers as follows: (I) the land grant acts of Congress, the Joint Resolution of 1908, and the Supreme Court decision in 1915; (II) the 1916 Act of Congress;

(III) the lawsuit in the District Court of the United States for the District of Oregon, *United States* v. *Oregon & C. R. R.;* (IV) the 1926 and 1937 Acts of Congress; (V) the present controversy and the questions presented; (VI) the doctrine of sovereign immunity and the rule as to judicial compulsion of ministerial duties of administrative officials; (VII) the opinion of the Supreme Court in *Larson* v. *Domestic & Foreign Corp.;* (VIII) a further discussion of sovereign immunity; (IX) authorities cited by the appellee Secretaries; (X) whether the actions of the Secretaries were discretionary; (XI) the views of our dissenting judge; (XII) conclusion as to the Secretary of the Interior; (XIII) conclusion as to the Secretary of Agriculture; and (XIV) directions to the District Court.

I

In 1866 Congress made to the California and Oregon Railroad Company a grant of public lands, consisting of every odd-numbered alternate section to the amount of twenty alternate sections per mile (ten on each side) of the railroad line.[1] The Act provided that, when any of these sections should be found to have been occupied or otherwise disposed of, other lands should be selected by the railroad in lieu thereof. These other lands, which came to be known as "lieu lands" or "indemnity lands", were to be in odd-numbered sections not more than ten miles beyond the limits of the primary grant.

[1] 14 Stat. 239.

In 1869 Congress amended the granting act so as to provide, among other things, that the lands granted should be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser and for a price not exceeding $2.50 per acre.[2] The railroad proceeded to violate this latter proviso, making sales of from 1,000 to 20,000 acres to one purchaser at prices ranging from $5.00 to $40.00 an acre and, in one instance, a sale of 45,000 acres at $7.00 an acre to a single purchaser.[3]

The matter came to the attention of Congress, and in 1908 a Joint Resolution was adopted directing the Attorney General to institute court proceedings to protect the rights of the United States, including a claim that the lands granted to the railroad had been forfeited to the United States by reason of violations of the terms of the granting acts.[4] The suit was brought and reached the United States Supreme Court.[5] The Court held against forfeiture but held that the railroads should be enjoined from any disposition of the lands until Congress should have an opportunity to provide for their disposition "and at the same time secure to the defendants [the railroads and their assignees] all the value the granting acts conferred upon the railroads."[6]

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[2] 16 STAT. 47.

[3] Oregon & C. R.R. v. United States, *infra* note 5.

[4] Pub. Res. 18, 60th Cong., 1st Sess., 35 STAT. 571.

[5] Oregon & C. R.R. v. United States, 238 U.S. 393, 59 L.Ed. 1360, 35 S.Ct. 908 (1915).

[6] *Id.*, 238 U.S. at 439, 59 L.Ed. at 1397.

II

Pursuant to that opinion of the Court the Congress in 1916 passed an act,[7] which referred to the foregoing circumstances in a series of "Whereases" and provided that the title to so much of the lands granted to the railroad as had not been sold prior to July 1, 1913, was thereby revested in the United States. The Congress then proceeded, in the Act, to direct what should be done with the land thus revested. It provided that the Secretary of the Interior, "in cooperation with the Secretary of Agriculture, or otherwise," should classify "said lands" into (1) power-site lands, (2) timber lands, and (3) agricultural lands; that the Secretary should sell the timber on the timber lands for cash; and that the non-mineral agricultural lands should be subject to entry and sale under the homestead laws. The Congress then dealt with the problem of compensating the railroad, which it was required to do by the Supreme Court ruling. The Act authorized and directed the Attorney General to institute a suit against the railroad "to have determined" the amount of moneys which had been received by the railroad on account of any of "said granted lands" and which should be charged against the railroad as part of the "full value" secured under the granting acts as interpreted by the Supreme Court. The Act repeatedly used the word "determination" in describing the contemplated action by the court. The Congress then dealt with the disposition of the

[7] 39 STAT. 218.

money which it anticipated would be derived from the revested lands. The Act provided that all moneys received on account of "said lands and timber" should be deposited in the Treasury of the United States in a special fund to be designated "The Oregon and California land-grant fund",[8] "which fund shall be disposed of in the following manner: * * *." Then followed a formula for the computation of the parts to be distributed. It provided for the payment from the fund of the amounts due the railroad and certain lienholders and for certain accumulated taxes. It then provided for the payment of the annual balances of the fund, in stated percentages, to the state treasurers of the states in which the lands were located, to the treasurers of the counties in which the lands were situated, and to the reclamation fund of the United States, the remainder to become part of the general fund in the Treasury of the United States. The statute provided: "The payments herein authorized shall be made to the treasurers of the States and counties, respectively, by the Treasurer of the United States, upon the order of the Secretary of the Interior, as soon as may be after the close of each fiscal year during which the moneys were received: * * *."[9]

The philosophy and purpose of the statute are plain upon a reading of the congressional debate which preceded its enactment. The original land grant statutes were designed to promote the de-

[8] *Id.* at 222.
[9] *Id.* at 223.

velopment of the West and, in this case, of the Oregon territory. The building of the railroad was conducive to the migration of people and goods. The railroads through sale of the land were supplied with funds, and the condition that the land be sold to settlers in small parcels and at a cheap price was to serve the cause of extensive settlement. The action of the railroad in selling the land to large purchasers, chiefly to lumber interests, frustrated this design. According to the Representatives in Congress from Oregon, the people in that State were bitter in blaming the Federal Government for inaction in this situation for over fifty years. Moreover, the proposed revesting of title in the United States would remove from the tax rolls of the State these huge tracts of land, theretofore taxable, and in this transition the schools and roads of the State would suffer. Congress recognized the justice of these claims, and it was for this purpose that it directed a division of the proceeds from the lands among the states, the counties, and the Federal Government. The debate was long and vigorous, every section of the bill being discussed. The Oregon Representatives proposed an amendment which would have given Oregon 80 per cent of the proceeds from the land instead of the 50 per cent which the bill provided; but that amendment was rejected on a roll-call vote. The debate in the House appears in Volume 53 of the *Congressional Record* at pages 8579-8619 and 8648-49.

The lawsuit authorized by the 1916 statute was brought by the United States as plaintiff against

the Oregon and California Railroad Company in the District Court of the United States for the District of Oregon. It was a suit for an accounting. The theory of the Act, as the court described it, was "that the railroad company should account to the government for these moneys received by it to which it was not entitled, while the government at the same time obligated itself to pay to the railroad company the full value, namely $2.50 per acre, for every acre of land to which it was entitled under the grants."[10] The court said: "Such being the thought and purpose, it becomes a matter of inquiry for ascertaining the exact acreage to which the railroad company was and is entitled as of right under its grants, and thereby determining the aggregate of the 'full value,' as declared by the Supreme Court."[11] Many of the facts were stipulated, as, for example, that within the primary limits of the grants were 4,218,902,69 acres. But there were many disputes, some of which were whether certain specified parcels of land were or were not within the grants. To accomplish its task and to decide the ultimate issue of amount, it was necessary that the court, as it announced, to determine these disputed issues. The court rendered a long opinion, making detailed findings upon the various items in dispute. It considered various disputes concerning land included in the primary grants. It then advanced to a considera-

[10] United States v. Oregon & C. R.R., 8 F. 2d 645, 647 (Ore. 1925).

[11] *Ibid.*

tion of certain controverted areas lying within the indemnity limits of the grant. There were twelve such items. The 472,000 acres with which we are here concerned constituted Item 13(k). That item was described by the court as follows:

> "(k) 472,000 acres, the mineral or non-mineral character of which had not been determined, were included within the limits of national forests by proclamation of the President of the United States. Of this area 190,000 acres were withdrawn for forest purposes prior to June 29, 1900, and the remainder were withdrawn subsequent to that date." [12]

The court first considered the general status of the indemnity lands and recited the well-settled rule that, where a deficiency within granted primary limits is so great that the indemnity lands would not make good the loss, no formal selection of the indemnity land is necessary to fix the right of the grantee to the entire indemnity land. The court then considered the items one by one.

In respect to Item 13(k) the question was whether the railroad company should have credit for these 472,000 acres, *i.e.*, whether the railroad was entitled to $2.50 for each of these acres. If they had been granted to the railroad, had not been sold, and had been revested in the United States, the railroad was entitled to that credit. These acres lay within the indemnity limits of the grant,

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[12] *Id.* at 655.

but they had been included by proclamation of the President within the limits of national forest reserves. If they had been validly granted to the railroad, they were not subject to appropriation by the President for forest reserves; on the other hand, if they were not within the grant, they were valid forest reserves and could not be included within the acreage for which the railroad company was entitled to be paid. That was the issue on Item 13(k). The court decided that these particular lands had been granted to the railroad and were not public lands at the time the Presidential proclamations had been issued. The court said:

> "All these reserves and additions were set apart by the President long subsequent to the time, as shown by the evidence, that a deficiency was found to exist within the indemnity limits to meet the losses sustained to the place limits, and it was therefore inadmissible for the government to reserve or appropriate to its own use any of such lands. The lands, by reason of the deficiency, as we have seen in our examination of item 13(i), had previously and necessarily become appropriated to meet the losses sustained to the place grant. They were not at that time a part of the public domain, and were unsusceptible of appropriation by the government." [13]

Judge Wolverton, who was the District Judge in the case, had also been the trial judge in the case

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[13] *Id.* at 660.

which went to the Supreme Court in 1915, and was thus thoroughly familiar with the problem.

The Oregon court gathered its several findings together into a decree. That decree read in pertinent part as follows:

> "(1) That the title to * * * all unpatented lands for which the defendant, Oregon and California Railroad Company, was entitled to receive patents under the grants as amended of July 25, 1866, and May 4, 1870, be quieted and confirmed in the plaintiff; * * *.
>
> "(2) That 3,727,889.94 acres were included within the grants * * * and that the said Oregon and California Railroad Company * * * is entitled to receive $2.50 per acre for said acreage * * *.
>
> "* * *
>
> "(4) That said acreage * * * includes the following described acreage within the indemnity limits of the grants, to-wit:
>
> "* * *
>
> "472,000 acres included within the limits of the National Forest."

The decree was entered in 1925. The decision was not appealed.

The purpose of the foregoing lawsuit was an accounting between the United States and the railroads upon the land grants and the revesting. Basic to that accounting was a determination of what lands had been granted to the railroad. The court determined that the 472,000 acres in Item 13(k) had been so granted. Not by the farthest stretch

of imagination could that conclusion be said to be *dictum*. It was part of the foundation upon which the accounting was based. The determination that these acres had been granted and, being unsold, were revested placed them squarely within the terms of the 1916 Act. As revested land they were subject to every provision of that Act, including the provisions that the Secretary of the Interior should classify "said lands" and sell the timber on lands of "class two" thereof; that all moneys received on account of "said lands and timber" should be deposited in the special account; and also those provisions concerning the payments to the counties in which "said lands" are situated, and concerning payments from the balance remaining "in said Oregon and California land grant fund."

The Government suggests that the decree of the court contains a proviso which supports its view. That proviso is:

> "* * * and provided further that nothing in this decree shall be construed to mean that the 472,000 acres of National Forest lands and the 645.95 acres of Klamath Lake Irrigation Project lands shall be sold under the provisions of Act of Congress of June 9, 1916, known as the Chamberlain-Ferris Act."

The Chamberlain-Ferris Act (referred to in this opinion as the 1916 Act) provided that revested non-mineral land should be subject to entry.[14] The

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[14] Sec. 5, 39 STAT. 220.

quoted portion of the Oregon court's decree was obviously a precautionary note by the judge, meaning that he did not intend his finding and decree to subject this land to homestead entry and sale and thus to void the reservations of the land by the President for national forests; he was not passing on that subject. He certainly did not mean to deny his whole finding and decree, which was that the land was within the grant and was revested.

It may well be, and probably is, true that upon the revesting the proclamations of the President attached to the lands and they became forest reserves so far as their future was concerned. But that fact could not destroy the specific directions of Congress as to what should be done with moneys received from sales of timber on them.

The action in the District Court of Oregon was brought by the United States. Having thus consented, it was a party, and it and all its agents were bound by the court's decision. We think, and hold, that the Secretary of Agriculture and all other Government officers were and are bound to recognize and abide that court's findings.

IV

In 1926 Congress passed an act [15] which required the Secretary of the Interior to pay taxes to the several counties in Washington and Oregon on the revested Oregon and California Railroad Company grant lands, as though these lands had remained privately owned.

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[15] 44 STAT. 915.

In 1937 Congress passed an act [16] which directed the Secretary of the Interior to manage for permanent forest production such of the revested Oregon and California Railroad lands as might be classified as timberlands, and to sell, cut and remove the timber therefrom in accordance with the "principal" of sustained yield. The act authorized the Secretary to restore to homestead entry such of the revested lands as were more suitable for agricultural lands, and to lease for grazing such of the revested lands as he might determine in his discretion. It provided that all the moneys received on account of grazing should be put in the "Oregon and California land-grant fund" in the Treasury.

Title II of this Act of 1937 read as follows (emphasis added):

> "That on and after March 1, 1938, all moneys deposited in the Treasury of the United States in the special fund designated the 'Oregon and California land-grant fund' *shall be distributed* annually as follows:
>
> "(a) Fifty per centum *to the counties in which the lands revested under the Act of June 9, 1916* (39 Stat. 218), *are situated,* to be payable on or after June 30, 1938, and *each year thereafter* to each of said counties *in the proportion that the total assessed value of the Oregon and California grant lands in each of said counties for the year 1915 bears to the total assessed value* of all of said lands in the

[16] 50 STAT. 874.

State of Oregon for said year, such moneys to be used as other county funds.

"(b) Twenty-five per centum to said counties as money in lieu of taxes accrued or which shall accrue to them prior to March 1, 1938, under the provisions of the Act of July 13, 1926 (44 Stat. 915), and which taxes are unpaid on said date, such moneys to be paid to said counties severally by the Secretary of the Treasury of the United States, upon certification by the Secretary of the Interior, until such tax indebtedness as shall have accrued prior to March 1, 1938, is extinguished.

"From and after payment of the above accrued taxes said 25 per centum shall be accredited annually to the general fund in the Treasury of the United States until all reimbursable charges against the Oregon and California land-grant fund owing to the general fund in the Treasury have been paid: *Provided,* That if for any year after the extinguishment of the tax indebtedness accruing to the counties prior to March 1, 1938, under the provisions of Forty-fourth Statutes, page 915, the total amount payable under subsection (a) of this title is less than 78 per centum of the aggregate amount of tax claims which accrued to said counties under said Act for the year 1934, there shall be additionally payable for such year such portion of said 25 per centum (but not in excess of three-fifths of said 25 per centum), as may be necessary to make up the

deficiency. When the general fund in the Treasury has been fully reimbursed for the expenditures which were made charges against the Oregon and California land-grant fund said 25 per centum shall be paid annually, on or after June 30, to the several counties in the manner provided in subsection (a) hereof.

"(c) Twenty-five per centum to be available for the administration of this Act, in such annual amounts as the Congress shall from time to time determine. Any part of such per centum not used for administrative purposes shall be covered into the general fund of the Treasury of the United States: *Provided,* That moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the Oregon and California land grant fund mentioned in subsection (b) so long as any such charges shall exist.

"All Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act."

The purpose of this statute is made clear by the Reports and the debate in the Senate.[17] The 1916 and 1926 Acts had been subjected to two basic criticisms. One was that they required the timber to be sold as rapidly as possible and the cut-over lands disposed of. The other was that they re-

[17] SEN. REP. No. 1231, 75th Cong., 1st Sess. (1937); H.R. REP. No. 1119, 75th Cong., 1st Sess. (1937); 81 CONG. REC. 9325-26 (1937).

quired the counties to submit claims for the equivalent of the taxes which would have accrued upon the revested lands, and these taxes were more than the proceeds from the sale of timber and land, creating a deficit due from the federal Treasury. The new Act provided for the management of the timber on a conservation basis and for the payment to the counties of the net proceeds from the sales each year. The intention that these net proceeds be paid to the counties was unmistakable in the Reports and the debate.

The terms and directives of the statutes of 1916 and 1937 were simple and plain. In the first place they dealt with the lands revested by the 1916 Act; they are prescriptions of what should be done with the money derived from land which had first been granted to a railroad and then taken from it. They conferred upon the Secretary of the Interior many duties requiring the exercise of his discretion and judgment. Those duties relate to classification of land, sale of timber, leases for grazing, homestead entries, etc. Then they contain certain mandatory directives to the Secretary, which do not involve any exercise of discretion or judgment on his part. Once he has made the many judgments required and has moneys in his hands arising from transactions respecting the revested lands—sales of land, sales of timber, grazing rentals—he must put those moneys in a special account in the Treasury, the name of which account is specified by the statute; and, when the end of each year arrives and a balance appears in that account, he must distribute

that balance to the entities named in the statute in the proportions named in the statute. The Secretary has no discretion whatever in two duties—to deposit the receipts and to disburse the balances left at the end of each year. The statutes make this indisputably clear. That in other respects and for other purposes, *e. g.*, withdrawal from homestead entry or for public purposes, this land may have been reserved by Presidential proclamations, is immaterial. Congress has specifically authorized the sale of the timber from this land, and such sales have in fact been made and the money is in fact in hand. Congress was specific as to what should be done with such money.

V

For years, however, the mandates of the 1916 and 1937 statutes have not been followed. On the contrary, the moneys received on account of these revested Oregon and California Railroad lands have not been put in an account bearing the name specified by the statute, but have been put in another special account bearing another name. The United States has not conformed to the decisions of the Oregon District Court in the action which the United States itself brought for the purpose of determining what it owed the railroads, which involved what were and what were not granted, and thus revested, lands. Disbursements have not been made to the named entities from the moneys received from the revested lands; the Secretary of the Interior has authorized no such disbursements.

The case presents two questions: *One.* Should the Secretary of Agriculture be ordered by the courts to desist from obstructing compliance by other officials of the United States with the findings and decisions of the Oregon District Court in *United States* v. *Oregon & C. R. R.*? [18] *Two.* Should the Secretary of the Interior be directed and required by the courts to comply with the mandatory directives of the 1937 statute and to perform the ministerial duties imposed upon him by that act of the Congress, that is, to deposit the moneys derived from the revested lands of the Oregon and California Railroad in the special account named by the statute and to authorize the Treasurer of the United States to pay to the statutory distributees their statutory proportions of whatever balances remain in that account? The answers to both questions are affirmative.

VI

The principal contention of the Secretaries is that this is an action against the sovereign United States, which has not consented to be sued, and that therefore the action will not lie.

Possible philosophical justification for a doctrine of sovereign immunity in our concept of government is a tempting topic for inquiry.[19] Neither of the two bases—Divine Right or the absolute and

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[18] 8 F.2d 645 (1925).

[19] See Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Weston, *Actions Against the Property of Sovereigns*, 32 HARV. L. REV. 266 (1919).

irrevocable transfer of power by the people—upon which the doctrine of sovereign power was built [20] exists in our theory of government. And the notion that Government officials can be too busy to respond to a citizen's assertion of rights is the precise antithesis of our proud postulate of government by law. And the amiable recitation that when an officer does right he acts officially but when he does wrong he acts individually is a bit of fiction designed to reconcile the maxim that the King can do no wrong with the plain fact that the King, and every other government, frequently does do very wrong,—a fact which we in this country in no wise attempt to deny.[21] We draw much from the British upon this subject,[22] but there is a basic difference between British sovereignty and our sovereignty. In Britain the government—the Crown and Parliament—is the sovereign.[23] In our system the people are the initial and also the residual sovereign; governments are their servants. The sovereign powers of our legislatures and executive officials are delegated by the people and are limited by the scope of the delegations. After some variations [24] the Supreme Court has in recent years

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[20] 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 192-195 (2d ed. 1937); 6 *id.* 296-299.

[21] See, *e.g.*, Federal Tort Claims Act.

[22] Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953).

[23] Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1919).

[24] The Siren, 7 Wall. (74 U.S.) 152, 19 L.Ed 129 (1869); Kawananakoa v. Polyblank, 205 U.S. 349, 51 L.Ed. 834, 27 S.Ct. 526 (1907).

declined to gel the basic theory of sovereignty in our system.[25]

Regardless of the foregoing, however, the law upon the problem before us was settled long ago. The rule is usually stated in terms of ministerial duty, as contrasted with the exercise of discretion. It is an acceptable thesis in our concepts of government that a sovereign action by one branch of government within the scope of its delegated power cannot be impeded or compelled by another branch without consent. Damage or compensation is another problem. When an extended examination is made into any considerable number of the many cases which have dealt with the problem in one form or another, it is easy to see that some such thesis is the philosophical touchstone of the rule which is well-nigh universally applied.

Controversy on the subject arose early in this country. It was, as everybody knows, presented and disposed of by the Supreme Court in *Marbury* v. *Madison*.[26] Chief Justice Marshall discussed the problem in its proper size and perspective as one of the fundamental facets of our system of law and government. The opinion is too familiar to require discussion, but two succinct passages are so directly pertinent to our present problem that we quote them:

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[25] Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 83 L.Ed. 784, 59 S.Ct. 516 (1939); United States v. Shaw, 309 U.S. 495, 501, 84 L. Ed. 888, 60 S. Ct. 659 (1940).

[26] 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803).

"But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." [27]

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any appli-

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[27] *Id.*, 1 Cranch (5 U.S.) at 166, 2 L.Ed. at 70.

cation to a court to control, in any respect, his conduct would be rejected without hesitation.

"But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."[28]

Since *Marbury* v. *Madison* the courts have followed its rule, compelling executive Government officials to comply with directives of the Congress where a specific directive imposed a ministerial duty devoid of the exercise of judgment or discretion.[29] Of course *mandamus* has been denied more

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[28] *Id.*, 1 Cranch (5 U.S.) at 170-171, 2 L.Ed. at 71.

[29] See, *e.g.*, Kendall v. United States, 12 Pet. (37 U.S.) 524, 9 L.Ed. 1181 (1838) (to compel making of credits); Board of Liquidation v. McComb, 92 U.S. 531, 23 L.Ed. 623 (1876) (relating to the use of bonds for liquidation of debt); United States v. Schurz, 102 U.S. 378, 26 L.Ed. 167 (1880) (to compel delivery of a land patent); Butterworth v. United States, 112 U.S. 50, 28 L.Ed. 656, 5 S.Ct. 25 (1884) (to compel issuance of a patent on an invention); Noble v. Union River Logging

often than it has been granted, but opinions in cases in which the writ was refused throw much light upon the problems.[30] With unremitting regularity

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R.R., 147 U.S. 165, 37 L.Ed. 123, 13 S.Ct. 271 (1893) (to compel executive officials to refrain from revoking approval of right-of-way over public lands); Roberts v. United States *ex rel.* Valentine, 176 U.S. 221, 44 L. Ed. 443, 20 S.Ct. 376 (1900) (to compel payment of interest on certain certificates); Garfield v. United States *ex rel.* Goldsby, 211 U.S. 249, 53 L.Ed. 168, 29 S.Ct. 62 (1908) (requiring Secretary to reinstate an erased name upon Indian rolls for undistributed share in lands); Ballinger v. United States *ex rel.* Frost, 216 U.S. 240, 54 L.Ed. 464, 30 S.Ct. 338 (1910) (to compel issuance of a land patent); Daniels v. Wagner, 237 U.S. 547, 59 L.Ed. 1102, 35 S. Ct. 740 (1915) (in which the Court described as "too obviously devoid of merit to require anything but statement" the contention that "because a patent of the United States is involved, therefore the United States is a necessary party"); Lane v. Hoglund, 244 U.S. 174, 61 L.Ed. 1066, 37 S.Ct. 558 (1917) (to compel issuance of a land patent); Work v. McAlester, Etc. Co., 262 U.S. 200, 67 L.Ed. 949, 43 S.Ct. 580 (1923) (to compel approval of a land patent); Work v. Lynn, 266 U.S. 161, 69 L.Ed. 223, 45 S.Ct. 39 (1924) (to compel payment of a fixed sum monthly to an Indian); Wilbur v. Krushnic, 280 U.S. 306, 74 L.Ed. 445, 50 S.Ct. 103 (1930) (directing disposal of a mining claim).

[30] See, *e.g.*, Wilbur v. United States, 281 U.S. 206, 74 L.Ed. 809, 50 S.Ct. 320 (1930) (to compel restoration to rolls of Indians, in which the construction of a statute was so uncertain as to require legal judgment); United States *ex rel.* Hall v. Payne, 254 U.S. 343, 65 L.Ed. 295, 41 S.Ct. 131 (1920) (involving construction of a statute which required judgment and discretion); United States v. Lamont, 155 U.S. 303, 39 L.Ed. 160, 15 S.Ct. 97 (1894) (to compel signing of a contract); United States v. Windom, 137 U.S. 636, 34 L.Ed. 811, 11 S.Ct. 197 (1891) (to compel delivery of a Treasury draft); United States v. Black, 128 U.S. 40, 32 L.Ed. 354, 9 S.Ct. 12 (1888) (relating to a pension); United States v. Lamar, 116 U.S. 423, 29 L.Ed. 677, 6 S.Ct. 424 (1886) (to compel a survey); United States v. Guthrie, 17 How. (58 U.S.) 284, 15 L. Ed. 102 (1855) (involving payment of a disputed salary);

the Supreme Court has stated the negative of the rule: *Mandamus* will not issue to control the judgment of an executive officer.[31] But these insistent repetitions emphasize the affirmative converse.

Two recent cases in this court are *Higginson* v. *Schoeneman*[32] and *American Dredging Co.* v. *Cochrane*,[33] in one of which the grant of *mandamus* was approved; in the other the denial of the writ was approved. Both cases rested upon precisely the same rule. In one it was concluded that the act of the administrative official involved his judgment or discretion, and in the other it was concluded that his action was purely ministerial.[34]

Within the last twenty years the highest courts of thirty-two states have sustained the issuance of *mandamus* to compel ministerial action by admin-

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Decatur v. Paulding, 14 Pet. (39 U.S.) 497, 10 L.Ed. 559 (1840) (concerning allowance of a pension). And also see West Coast Exploration Co. v. McKay, U.S. App. D.C., Jan. 26, 1954.

[31] See Reeside v. Walker, 11 How. (52 U.S.) 272, 13 L.Ed. 693 (1850); United States v. Seaman, 17 How. (58 U.S.) 225, 15 L.Ed. 226 (1855); Holloway v. Whiteley, 4 Wall. (71 U.S.) 522, 18 L.Ed. 335 (1867); United States *ex rel.* McConnell v. Edmunds, 5 Wall. (72 U.S.) 563, 18 L.Ed. 692 (1867); United States *ex rel.* Ness v. Fisher, 223 U.S. 683, 56 L.Ed. 610, 32 S.Ct. 356 (1912); United States *ex rel.* Alaska Smokeless C. Co. v. Lane, 250 U.S. 549, 63 L.Ed. 1135, 40 S.Ct. 33 (1919).

[32] 89 U.S. App. D.C. 126, 190 F.2d 32 (1951).

[33] 89 U.S. App. D.C. 88, 190 F.2d 109 (1951).

[34] See also the extended discussions by Judge Vinson in United States v. Ickes, 69 App. D.C. 324, 101 F.2d 248 (1938), and Judge Stephens in United States v. Ickes, 68 App. D.C. 399, 98 F.2d 271 (1938), *cert. denied*, 305 U.S. 619, 83 L.Ed. 395, 59 S.Ct. 80 (1938).

istrative officials in government.[35] Within that same recent period many other state supreme courts have discussed and affirmed the rule.

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[35] State v. Stone, 232 Ala. 16, 166 So 602 (1936); Alberts v. McGirk, 51 Ariz. 510, 78 P.2d 483 (1938); Golden v. McCarroll, 196 Ark. 443, 118 S.W. 2d 252 (1938); Palmer v. Fox, 258 P.2d 30 (Cal. 1953); People v. Board of Trustees of Firemen's Pension Fund, 103 Colo. 1, 82 P.2d 765 (1938); State v. Thomson, 131 Conn. 82, 37 A.2d 689 (1944); City of Macon v. Herrington, 198 Ga. 576, 32 S.E.2d 517 (1944); Murtaugh Highway Dist. v. Merritt, 59 Idaho 603, 85 P.2d 685 (1938); People v. Trustees of S. of Township No. 1 South, Etc., 319 Ill. App. 370, 49 N.E.2d 666 (1943); State v. Bender, 102 Ind. App. 185, 1 N.E.2d 662 (1936); Independent School Dist. of Danbury v. Christiansen, 242 Iowa 963, 49 N.W.2d 263 (1951); State v. Board of Comm'rs of Kearny County, 146 Kan. 461, 72 P.2d 67 (1937); McFarland v. Withers, 274 Ky. 65, 118 S.W.2d 156 (1938); State v. Board of Trustees, Teachers' Retirement, Etc., 29 So.2d 489 (La. 1947); Board of Sup'rs of Elections v. County Comm'rs, 88 A.2d 462 (Md. 1952); National Bank of Detroit v. State Land Office Board, 300 Mich. 240, 1 N.W.2d 525 (1942); State v. Welsch, 235 Mo. App. 15, 124 S.W.2d 636 (1939); State v. Geurkind, 111 Mont. 417, 109 P.2d 1094 (1941); Smith v. Nebraska Liquor Control Comm'n, 152 Neb. 676, 42 N.W.2d 297 (1950); State v. Eighth Judicial District Court, 64 Nev. 256, 180 P.2d 590 (1947); Garrou v. Teaneck Tryon Co., 11 N.J. 294, 94 A. 2d 332 (1953); City of New York v. Schoeck, 294 N.Y. 559, 63 N.E.2d 104 (1945); Hamlet Hospital and Training Sch. v. Joint Committee, 234 N.C. 673, 68 S.E.2d 862 (1952); Board of County Comm'rs of Osage County v. Prentice, 183 Okla. 542, 83 P.2d 557 (1938); Seufert v. Stadelman, 178 Ore. 646, 167 P.2d 936 (1946); Hotel Casey Co. v. Ross, 343 Pa. 573, 23 A.2d 737 (1942); Greenwood Volunteer Fire Co. v. Dearden, 64 R.I. 368, 12 A.2d 408 (1940); Easler v. Maybank, 191 S.C. 511, 5 S.E.2d 288 (1939); State v. Clark, 173 Tenn. 81, 114 S.W.2d 800 (1938); Coleman v. Bench, 96 Utah 143, 84 P.2d 412 (1938); Gaffney v. Commissioners of Jail Delivery, 112 Vt. 438, 27 A.2d 114 (1942); State v. Raleigh County Court, 76 S.E.2d 579 (W.Va. 1953).

It is suggested to us that, whenever property or money of the United States is involved in a lawsuit, the United States is a necessary party. Of course it is a general rule of law that, when a plaintiff directly attacks the title to a piece of property, the owner is an indispensable party. That rule applies whether the owner is the United States or a private person. There are many cases, *e.g.*, condemnation, trespass to try title, bill to quiet title, to foreclose, etc., applying that rule to property owned by the United States.[36] Of the same nature are suits in which complainants seek to compel a transfer of title by the owner of property; the owner, whether the United States or not, is an indispensable party.[37] And there are cases involving sales of Government property, where Congress has authorized an executive official to dispose of the property and a plaintiff has sought to control or restrain that official's action. Authority to sell includes discretion and judgment as to terms, conditions, time, etc.[38] Such

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[36] Minnesota v. United States, 305 U.S. 382, 83 L.Ed. 235, 59 S.Ct. 292 (1939); Louisiana v. Garfield, 211 U.S. 70, 53 L.Ed. 92, 29 S.Ct. 31 (1908); The Siren, 7 Wall. (74 U.S.) 152, 19 L.Ed. 129 (1869).

[37] Young v. Anderson, 81 U.S. App. D.C. 379, 160 F.2d 225 (1947), *cert. denied*, 331 U.S. 824, 91 L.Ed. 1840, 67 S.Ct. 1316 (1947); Seiden v. Larson, 88 U.S. App. D.C. 258, 188 F.2d 661 (1951), *cert. denied*, 341 U.S. 950, 95 L.Ed. 1373, 71 S.Ct. 1017 (1951).

[38] See American Dredging Co. v. Cochrane, *supra*, and, as to contracts to purchase, International Trading Corporation v. Edison, 71 App. D.C. 210, 109 F.2d 825 (1939), *cert. denied*, 310 U.S. 752, 84 L.Ed. 1417, 60 S.Ct. 1099 (1940).

are *United States* ex rel. *Goldberg* v. *Daniels*[39] and *Larson* v. *Domestic & Foreign Corp.*[40]

VII

Some confusion has arisen because of the idea that the opinion of the Supreme Court in *Larson* v. *Domestic & Foreign Corp.* was a complete summation of all the rules relating to the issuance of *mandamus* against public officials. But the opinion did not purport to deal with an order sought to compel ministerial action. The problem in *Larson* was a threatened alleged illegal action. An executive official had been authorized by the Congress to dispose of certain Government property. The Court described the two familiar types of cases in which threatened illegal action can be enjoined, (1) action outside the official's authority and (2) action under an unconstitutional delegation of authority. Then the Court carefully explained the rule that, even though a Government agent threatens to commit a tort while acting within the scope of his delegated power, the tort cannot be enjoined without consent of the sovereign principal, since it is also the act of the sovereign. The confusion arises principally because of a footnote to the opinion[41] which reads as follows:

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or

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[39] 231 U.S. 218, 58 L. Ed. 191, 34 S.Ct. 84 (1913).
[40] 337 U.S. 682, 93 L.Ed. 1628, 69 S.Ct. 1457 (1949).
[41] *Supra*, 337 U.S. at 691, n. 11.

beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina* v. *Temple,* 134 U. S. 22 (1890)."

It is suggested that this footnote means that a suit will fail if the relief requested would involve the disposition of Government property. But the footnote does not make that statement. Rather its meaning is that a suit must fail if it would require the sovereign to dispose of its property—sovereign action, in other words. That meaning is borne out by the one citation made. The one case cited was *North Carolina* v. *Temple,*[42] and the Supreme Court, in the course of that opinion, said of the case: "In other words, it is a suit, in the nature of a bill for a specific performance of a contract, brought to compel the State of North Carolina to raise a tax for the payment of the arrears of interest due on the state bonds held by the plaintiff and others." The State and the State Auditor were named parties defendant. Holding in two brief sentences that that suit was "virtually" against the State itself, the Court cited four cases. We examine them. *Louisiana* v. *Jumel*[43] was a suit which sought to compel officials of the State of Louisiana to carry out general duties as executive officials of the State.

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[42] 134 U.S. 22, 33 L.Ed. 849, 10 S.Ct. 509 (1890).
[43] 107 U.S. 711, 27 L.Ed. 448, 2 S.Ct. 128 (1883).

"The remedy sought," said the Court, "in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law * * *."[44] *Cunningham* v. *Macon, Etc. R. R. Co.*[45] contained an elaborate discussion of the principles upon which a state is held not to be an indispensable party (although some interest of the state may be more or less involved), dividing the cases into three classes. The third class consisted of those cases in which the duty to be performed was merely ministerial and could be compelled by *mandamus*. The Court cited with approval *Marbury* v. *Madison* and other similar cases. *Hagood* v. *Southern* [46] involved several suits which, the Supreme Court said, "are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it." [47] The Court observed: "If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in federal tribunals, it is difficult to conceive the frame of one which would be." [48] Ex Parte *Ayers* [49] was a petition for a writ of *habeas corpus*. The petitioners had been sentenced for contempt for violation of an order of a court. The question was whether the court had power to issue

[44] *Id.*, 107 U.S. 727, 27 L.Ed. at 454.
[45] 109 U.S. 446, 27 L.Ed. 992, 3 S.Ct. 292 (1883).
[46] 117 U.S. 52, 29 L.Ed. 805, 6 S.Ct. 608 (1886).
[47] *Id.*, 117 U.S. at 67, 29 L.Ed. at 810.
[48] *Id.*, 117 U.S. at 69, 29 L.Ed. at 810.
[49] 123 U.S. 443, 31 L.Ed. 216, 8 S.Ct. 164 (1887).

the order which had been violated. That issue depended upon whether the suit was against the state. After an elaborate discussion the Court pointed out that "The acts sought to be restrained are the bringing of suits by the State of Virginia in its own name and for its own use."[50] Thus neither *North Carolina* v. *Temple* nor any of the cases cited in it stated or held that a suit would fail merely because it involved disposition of sovereign property.

In *American Dredging Co.* v. *Cochrane, supra,* we said that a non-discretionary act required of an official falls within the exception stated in the *Larson* case, *supra,* relating to acts without authority. If *Larson* is to be deemed a complete statement of all the rules relating to court orders addressed to executive officials, the view indicated in *American Dredging* must be correct. Because, if *Larson* is the summation of all the law on the whole subject, and if court orders compelling performance of merely ministerial acts are not within one of the exceptions stated in *Larson,* the Supreme Court must be deemed to have overruled the entire line of cases on that subject, stemming from *Marbury* v. *Madison.* We think it inconceivable that the Court would take such a step without mentioning the rule of those cases or the cases themselves, and particularly that it would take such sweeping action in a footnote to an opinion which did not involve the point.

Differing somewhat from the suggestion we made

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[50] *Id.,* 123 U.S. at 497, 31 L.Ed. at 227.

in the *American Dredging Co.* case, it seems to us now that the Court in the *Larson* case, consistently with its action in other cases dealing with sales, did not regard the rule as to ministerial duty relevant to the problem before it. In the past, although the same Justices who sat in one type of case,—*i.e.*, ministerial duty,—also sat in the other type,—*i.e.*, sales of property,—they apparently did not consider that the rule in one impinged upon the rule in the other. For example, Mr. Justice Holmes, who wrote the opinion in *United States* ex rel. *Goldberg* v. *Daniels, supra,* also sat in *Ballinger* v. *United States* ex rel. *Frost,*[51] *Lane* v. *Hoglund,*[52] and *Work* v. *McAlester, Etc. Co.,*[53] in all three of which the Court unanimously affirmed the issuance of *mandamus* to compel completion of patents to land; and he also wrote the opinion in *Santa Fe Pac. R.R. Co.* v. *Fall,*[54] in which the Court reversed a denial of an injunction sought to prevent cancellation of selections of land for patents.

VIII

The sovereign power over Government property was vested by the people in the Congress.[55] As a matter of fact the property problem in the great Northwest was one of the impelling reasons for a Federal Government.[56] Congress can exercise that

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[51] 216 U.S. 240, 54 L.Ed. 464, 30 S.Ct. 338 (1910).
[52] 244 U.S. 174, 61 L. Ed. 1066, 37 S. Ct. 558 (1917).
[53] 262 U.S. 200, 67 L.Ed. 949, 43 S.Ct. 580 (1923).
[54] 259 U.S. 197, 66 L.Ed. 896, 42 S.Ct. 466 (1922).
[55] U. S. Const. Art. IV, § 3.
[56] 1 Curtis, Constitutional History of the United States c. XIV (1889).

power itself, or it can confer on some agency or officer a measure of sovereign authority over certain property, for example, power to sell. If, on the other hand, Congress itself exercises the full of the sovereign power in respect to property, it may and usually does leave mechanical, ministerial or administrative details to an individual official. In such a case the act of Congress is the complete act needed by the sovereign; the subsequent ministerial acts do not involve sovereign power. If Congress itself were to transfer title to a parcel of public land to a named individual, the officer preparing and executing the documents pursuant to congressional direction would not be exercising sovereign power.

IX

Appellee Secretaries cite *Mine Safety Co.* v. *Forrestal.*[57] The Supreme Court, in pointing out the basis upon which it held *mandamus* not available in that case, said: "Certainly the action which the Secretary proposed to take is not a violation of any express command of Congress. Cf. *Rolston* v. *Missouri Fund Comm'rs,* 120 U.S. 390, 411; *Houston* v. *Ormes,* 252 U.S. 469; *Smith* v. *Jackson,* 246 U.S. 388." [58] In *Houston* v. *Ormes* the Court had affirmed a decree which established a lien upon funds in the Treasury. In *Smith* v. *Jackson* it had affirmed a decree which directed payment of a judge's salary without certain deductions. In *Rolston* v. *Missouri Fund Comm'rs* it had affirmed a decree

[57] 326 U.S. 371, 90 L.Ed. 140, 66 S.Ct. 219 (1945).
[58] *Id.,* 326 U.S. at 374.

which compelled state officers to assign certain liens on property mortgaged in favor of the state. Each of those three cases involved property or money. In each the Court acted upon the declared rule that *mandamus* will issue to compel performance of a ministerial duty imposed upon an officer by the legislature. Clearly the statement above quoted from the *Mine Safety* case was a reaffirmation of that rule.

Appellee Secretaries cite *Haskins Bros. & Co.* v. *Morgenthau,*[59] but in that case Judge Groner pointed out, "Nor is it a suit for the purpose of requiring an officer to perform a plain ministerial duty, for likewise in such a case a court may compel him to perform the duty."[60] They cite *Stitzel-Weller Distillery* v. *Wickard,*[61] but one of the main points at issue in that case was whether Congress had directed distribution of the moneys to plaintiffs, and this court held that it had not so directed; thus the implicit crux of the decision was the existence *vel non* of a congressional directive. They cite *Osage Tribe of Indians* v. *Ickes,*[62] but the basis of that suit was the alleged unconstitutionality of a statute which directed the disposition of the funds, and the court held that the United States as statutory trustee of the disputed money was a necessary

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[59] 66 App. D.C. 178, 182, 85 F.2d 677, 681 (1936), *cert. denied,* 299 U.S. 588, 81 L.Ed. 433, 57 S.Ct. 118 (1936).

[60] *Id.,* at 185, 85 F.2d at 684.

[61] 73 App. D.C. 220, 118 F.2d 19 (1941).

[62] 77 U.S. App. D.C. 114, 133 F. 2d 47 (1943) (affirming on the opinion at 45 F.Supp. 179 (D.C. D.C. 1942)), *cert. denied,* 319 U.S. 750, 87 L.Ed. 1704, 63 S.Ct. 1158 (1943).

party. The Secretaries cite *Morrison* v. *Work*,[63] but the Supreme Court there specifically noted that it did not reach the question "whether the duty of the Secretary of the Interior is merely ministerial".[64] *Young* v. *Anderson*,[65] cited by appellee Secretaries, was a suit to set aside a title in the United States, reversing prior sales and condemnations; the ministerial act problem was not remotely involved. Of the same nature was *Seiden* v. *Larson*,[66] also cited by appellees.

We think it clear from the cases that the critical factor in a suit to compel action by an executive officer of the Government is whether the action sought to be compelled is ministerial or involves judgment and discretion. The problem assumes greater and greater importance as the administrative process grows, because more and more executive and administrative officers are dealing more and more with rights of individual citizens.

X

Appellee Secretaries say that the actions here sought to be compelled by *mandamus* involve discretionary matters. In this part of their argument they apparently concede that if the duty to be performed is ministerial *mandamus* can issue to com-

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[63] 266 U.S. 481, 69 L.Ed. 394, 45 S.Ct. 149 (1925).

[64] *Id.*, 266 U.S. at 489-490.

[65] 81 U.S. App. D.C. 379, 160 F.2d 225 (1947), *cert. denied*, 331 U.S. 824, 91 L.Ed. 1840, 67 S.Ct. 1316 (1947).

[66] 88 U.S. App. D.C. 258, 188 F.2d 661 (1951), *cert. denied*, 341 U.S. 950, 95 L.Ed. 1373, 71 S.Ct. 1017 (1951).

pel it; for they say that relief can be thus granted only when the duty is ministerial. They describe the discretionary matters as being the fact that the land here involved has long been administered by the Secretary of Agriculture as an integral part of the national forests. They say that the moneys have never been put in the "Oregon and California land-grant fund" but were put in another fund. Thus they say that the status of the land and the money "is a much mooted question". The difficulty with that contention is that those matters are "much mooted" only within the executive branch of government in disregard of (1) a valid finding and decree of a federal court and (2) a specific act of the Congress. That these 472,000 acres were within the national forests was the precise argument made to the District Court of Oregon in an effort to persuade that court that these were not Oregon and California railroad lands revested in the United States by the 1916 Act of Congress. The moneys now involved are the balances of the funds described in the 1916 Act, derived from the sale of timber described in the same act, on the lands which were the subject of that same 1916 Act. Executive officers cannot under such circumstances create an area of doubt and dispute which will be outside the established power of the judiciary to compel obedience to a clear mandate of the Congress. They cannot by bootstraps manufactured by them lift themselves out of the jurisdiction of the courts.

XI

Our dissenting judge is of the view that Congress did not unmistakably authorize the determination in the civil action in the Oregon District Court of the question of what lands had been granted. He says that the action Congress authorized was to determine the moneys received by the railroad on account of the granted lands. But it seems clear to us that to determine the moneys received by the railroad "on account of any of said granted lands," the court had to determine what the granted lands were. The court so construed its duty, and we think it was correct in doing so. The United States did not appeal from that treatment.

Our dissenting judge places major emphasis upon an extract from Section 10 of the 1916 Act, which dealt with the disposition of the moneys derived from the revested lands. After directing that all these moneys be placed in the Oregon and California land-grant fund, the act provided that that fund "be disposed of in the following manner". Then followed a formula. The Secretary was to "ascertain * * * the exact number" of acres of granted land and multiply that figure by $2.50. From that sum he was to make certain deductions and then, year by year, pay the balance to the railroad and certain lienholders until they had been fully paid their due. Thereafter the section provided that the balances should be paid to the counties, etc. In the first place we note that Congress did not authorize the Secretary to *deter-*

mine anything; it directed him to "ascertain". "Ascertain" does not mean decide; it means learn. He was not to ascertain what acres or parcels had been granted but merely the *number of* acres granted. This was apparently a simple arithmetical computation, because a certain number of acres had been granted for each mile of track built. The complication of determining what parcels and acres had been granted arose when revesting was declared and it became necessary to determine what moneys the railroad had received on account of the granted lands. That task Congress left to the court in the suit it directed the Attorney General to bring. The number of acres granted was clear enough; what particular land comprised those acres was a different and difficult problem. In the next place it seems to us to be impossible to believe that Congress meant to authorize a suit for the determination of the moneys which had been received by the railroad on account of the granted lands, and then in the same act authorize the Secretary to determine what lands had been granted. Congress very carefully did not do that. Its words were precise, and we think it meant what it said.

XII

As we pointed out in our examination of the statutes involved in the case at bar, Congress gave the Secretary of the Interior authority in certain respects in regard to the lands revested from the Oregon and California Railroad and in respect to the timber on those lands. In the exercise of those

duties he was required to use his discretion and judgment. Those actions could not be controlled by the courts. But when those duties were all completed, and at the end of the year a balance remained in the Oregon and California land-grant fund in the Treasury, the Secretary had no discretion as to his action. He was specifically and unequivocally directed by the Congress to cause the distribution of that balance according to the terms of the statute. That function of the Secretary fell within the line of cases beginning with *Marbury* v. *Madison*, which we have cited. The courts can and should require him to comply with the congressional mandate.

XIII

With respect to the other question presented to us, which concerns the Secretary of Agriculture, this court has held, without equivocation, that Government officials are bound to comply with the valid decisions of the courts.[67] In a valid final decision of a federal court in a suit to which the United States was a party by its own action, the lands here involved were held to be lands of the Oregon and California Railroad Company which were revested by act of Congress and which, as

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[67] Land v. Dollar, 88 U.S. App. D.C. 311, 190 F.2d 366 (1951); Land v. Dollar, 89 U.S. App. D.C. 38, 190 F.2d 623 (1951). (The orders in these cases were stayed and eventually dismissed by the Supreme Court.) See also International Union, Etc. v. United States, 85 U.S. App. D.C. 149, 177 F.2d 29 (1949), *cert. denied*, 338 U.S. 871, 94 L.Ed. 535, 70 S.Ct. 140 (1949).

revested lands, came within the statutes we have discussed. The Secretary of Agriculture, like every other Government official, is required to abide by the terms of that court decision.

We conclude that the case at bar is not, within the meaning and principle of the authorities, an action against the United States Government and that the United States is not an indispensable party.

XIV

The judgment of the District Court will be reversed and the case remanded with instructions to enter a decree in accordance with the terms of this opinion. The decree will enjoin the Secretary of Agriculture from interfering with compliance by any other Government official with the terms of the Acts of 1916 and 1937, and specifically from interfering with the distribution by the Secretary of the Interior and the Treasurer of the United States of the moneys which remain as balances in the account in the Treasury which by the terms of the statute was a special account of which the proper title was "The Oregon and California land-grant fund", and from interfering with the treatment of the 472,000 acres of land here involved as land revested from the railroad by the 1916 Act of Congress; and will direct the Secretary of the Interior to issue authorization to the Treasurer of the United States to distribute the balances in the aforesaid account to the entities named in the pertinent statutes and in the proportions therein specfied.

Reversed and remanded.

EDGERTON, Circuit Judge, *dissenting:* The court's conclusion rests on the premise, among others, that in the 1916 Act Congress unmistakably authorized the District Court for Oregon to decide whether the 472,000 acres of government land here involved had been granted to the railroad. I think this premise erroneous.

The 1916 Act revested in the United States so much of the granted lands as had not been sold by the railroad. In § 7, the Act expressly authorized the Attorney General to "institute and prosecute . . . suits . . . against the Oregon and California Railroad Company . . . to have determined *the amount of moneys which have been received by the said railroad company* . . . on account of . . . granted lands . . . *and which should be charged against it* as a part of the 'full value' secured to the grantees under said granting Acts as heretofore interpreted by the Supreme Court." (Emphasis added.) 39 STAT. 221. The Act did not, expressly or by any implication that I can see, authorize a court to determine in such a suit what lands had been granted.

There is some implication to the contrary, for § 10 of the Act, which said nothing about a court or a suit or the Attorney General, authorized *the Secretary of the Interior* to ascertain how much land had been granted. 39 STAT. 222.

This court says that "to determine the moneys received by the railroad 'on account of any of said granted lands,' the court had to determine what the

granted lands were." This seems to me both debatable and immaterial. It is immaterial because it applies only to lands which the railroad had sold and which, therefore, were not revested in the United States by the 1916 Act. As the court points out elsewhere in its opinion, we are concerned with lands which the railroad had *not* sold and which *were* revested in the United States by the 1916 Act.

Though the court says the words of Congress "were precise, and we think it meant what it said", the court points to no precise words by which Congress said that the District Court for Oregon might decide what lands were granted. I do not suggest that the question whether Congress meant that is not debatable. But the very fact that it is debatable means that the status of the lands and funds now in suit is not so clear as to make the duties of the Secretaries merely ministerial. I do not reach other questions.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11844

CLACKAMAS COUNTY, OREGON, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, APPELLANT

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, APPELLEES

MEMORANDUM

Filed October 21, 195[illegible]

Before EDGERTON, WILBUR K. MILLER, and PRETTYMAN, Circuit Judges.

PER CURIAM: The court has before it a petition for rehearing and several motions.

1. In so far as the petition for rehearing requested rehearing *in banc,* it was denied by the court on June 21, 1954. In the course of their petition for rehearing appellees urged that the court's judgment directed an action which is premature in the present status of the case. In Section XIV of the opinion promulgated April 30, 1954, this court directed the entry of a decree and specified the terms of the decree. This was an inadvertence arising from references in the record and briefs to summary judgment in the District Court. As a matter of fact the District Court granted a motion to

dismiss the complaint. The defendant Secretaries had not pleaded, other than to move to dismiss, and a motion for summary judgment was neither made nor considered. Section XIV of the opinion of April 30, 1954, will be stricken and the following inserted in lieu thereof:

XIV

> The judgment of the District Court will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Of course, if the allegations of the complaint are substantially established as pleaded, a decree of the District Court not inconsistent with the opinion of this court would contain substantially the matter described in our original Section XIV. The petition for rehearing will be denied.

2. Appellees move that the judgment heretofore entered by this court be vacated, the opinion promulgated April 30, 1954, be withdrawn, and the case be remanded to the District Court as moot because of the enactment on June 24, 1954, of Public Law 426, 68 Stat. 270. The gist of the controversy is that the defendant Secretaries have failed and refused to comply with an Act of Congress of 1916, 39 Stat. 218, known as the Chamberlain-Ferris Act, and a further Act of 1937, 50 Stat. 874, which was based upon and further implemented the Act of 1916. The judgment of this court was that it was and is the duty of the Secretaries to comply with the 1937 Act, and that they could and should be required to

do so. Public Law 426, approved June 24, 1954, provides that the revenues derived from these lands and placed in special deposit "shall be disposed of in accordance with the provisions of title II of the Act approved August 28, 1937 (50 Stat. 874) as hereby amended". It is not alleged, and it does not appear, that the amendments to the 1937 Act made by Public Law 426 changed the distribution directed by the 1937 Act. The amendments went principally to the future administration of the revested lands, a matter which was not involved in this litigation or considered in the opinion of this court, as the opinion itself carefully noted. This view is supported by the statement made on behalf of the seventeen Oregon counties to the Senate Committee considering the bill which became Public Law 426.[1] Therefore it appears that, in so far as it is pertinent to the present controversy, Public Law 426 merely directs the Secretaries to comply with the 1937 Act, which is precisely what the court directed them to do. No statement is made that the Secretaries have complied by distributing the funds in accordance with the distribution directed in the 1937 Act. It thus clearly appears that the judgment of the court has not been rendered moot. The motion to dismiss as moot will be denied. Likewise the prayers, contained in the same motion, to vacate the judgment and to withdraw the opinion will be denied.

---

[1] Statement of Frank S. Sever, *Hearing before Committee on Interior and Insular Affairs on S. 2225*, 83d Cong., 2d Sess. 38 (1954).

3. Seventeen counties in Oregon move for leave to intervene for the purpose of filing a motion to dismiss the appeal as moot. The complaint in this case was brought by Clackamas County, Oregon, as one of eighteen counties which, it contended, were entitled to the funds derived from the revested lands. In the complaint the plaintiff said: "Clackamas County brings this suit on its own behalf, and in behalf of any other of the 18 Oregon counties interested who may see fit to come in and become parties, or who may be brought in by order of this Honorable Court under its powers in the premises." The names of the other seventeen counties were listed. So far as the record before us shows, none of the other seventeen counties sought to become a party and none was brought in by order of the court. Nevertheless it is clear as a practical matter that, if, pursuant to the opinion of this court of April 30, 1954, it should eventuate that the District Court should compel the Secretaries to distribute the funds pursuant to statute, each of the seventeen counties will receive its share and will thus be a beneficiary of the litigation. These counties say that they expect the Secretaries to comply with Public Law 426 and that thus they will receive their distributive share of the funds quite apart from the litigation.

A petition to intervene is addressed to the sound discretion of the court, and particularly is this so where the petition comes so late in the litigation, after judgment has been entered by the appellate court. Under all these circumstances the petition

to intervene will be denied. In this connection we call attention to what we have hereinabove said in connection with the motion of the Secretaries to dismiss the litigation as moot.

4. Appellant moves for leave to file the printed hearings which are part of the legislative history of Public Law 426, approved June 24, 1954. This motion will be granted in view of the motions of the seventeen counties and of the appellee Secretaries, which are premised upon Public Law 426.

5. Appellant moves to file a supplemental memorandum in opposition to the Secretaries' motion to vacate the judgment and dismiss as moot. This motion will be granted.

6. Appellant moves for leave to file a telegram, which telegram appears to have been directed from the Commissioners of Clackamas County, Oregon, and its counsel in Oregon to local counsel. It is in the nature of a brief in opposition to the motion of the motion of the appellee Secretaries for amendment of the opinion. The motion will be granted and the telegram of counsel filed as a memorandum in argument upon that motion of the appellee Secretaries.

EDGERTON, *Circuit Judge,* took no part in these rulings.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1954

No. 11,844

CLACKAMAS COUNTY, OREGON, a Political Subdivision of the State of Oregon, APPELLANT,

v.

DOUGLAS MCKAY, Secretary of the Interior, and EZRA TAFT BENSON, Secretary of Agriculture, APPELLEES.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Wilbur K. Miller, and Prettyman, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is.....ordered and adjudged by this Court that the judgment .....of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to

enter a decree in accordance with the terms of the opinion of this Court.

Dated: April 30, 1954.

Per Circuit Judge Prettyman.

Separate dissenting opinion by Circuit Judge Edgerton.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1954

No. 11,844

CLACKAMAS COUNTY, OREGON, a Political Subdivision of the State of Oregon, APPELLANT,

v.

DOUGLAS MCKAY, Secretary of the Interior, and EZRA TAFT BENSON, Secretary of Agriculture, APPELLEES.

Before: Edgerton, Wilbur K. Miller, and Prettyman, Circuit Judges, in Chambers.

ORDER

It is ORDERED by the Court that the second paragraph of the judgment entered herein April 30, 1954, be, and it is hereby, amended to read as follows:

"ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with this opinion."

Per Curiam.

Dated: October 21, 1954.

Circuit Judge Edgerton did not participate in the above order.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,844, OCTOBER TERM, 1954

CLACKAMAS COUNTY, OREGON, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, APPELLANT

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, APPELLEES

Before: Edgerton, Wilbur K. Miller, and Prettyman, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellees' petition for rehearing and that said rehearing be in banc, and of the appellant's answer thereto, and it appearing

that on June 21, 1954, an order was entered by this Court denying said petition insofar as request was made for a rehearing in banc, it is

ORDERED by the Court that the petition for rehearing herein be, and it is hereby, denied.

Per Curiam.

Dated: October 21, 1954.

Circuit Judge Edgerton did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,844, OCTOBER TERM, 1954

CLACKAMAS COUNTY, OREGON, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, APPELLANT

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, APPELLEES

Before: Edgerton, Wilbur K. Miller, and Prettyman, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellees' motion to vacate the judgment of this Court entered herein April 30, 1954, to withdraw the opinion entered herein April 30, 1954, and to remand this case to the United States District Court for dismissal as moot,

and of appellant's memorandum in opposition thereto, it is

ORDERED by the Court that the aforesaid appellees' motion be, and it is hereby, denied.

Per Curiam.

Dated: October 21, 1954.

Circuit Judge Edgerton did not participate in the foregoing order.

SUPREME COURT
OF THE UNITED STATES

No....., OCTOBER TERM, 1954

DOUGLAS MCKAY, Secretary of the Interior, and EZRA TAFT BENSON, Secretary of Agriculture,
PETITIONER

v.

CLACKAMAS COUNTY, OREGON

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 18, 1955.

(Signed) EARL WARREN,
Chief Justice of the United States.

Dated this 14th day of January, 1955.

APPENDIX B

Title II of the Act of August 28, 1937, 50 Stat. 874, 875-876, prior to the amendment contained in the Act of June 24, 1954, 68 Stat. 270-271, read as follows:

TITLE II

That on and after March 1, 1938, all moneys deposited in the Treasury of the United States in the special fund designated the "Oregon and California land-grant fund" shall be distributed annually as follows:

(a) Fifty per centum to the counties in which the lands revested under the Act of June 9, 1916 (39 Stat. 218), are situated, to be payable on or after June 30, 1938, and each year thereafter to each of said counties in the proportion that the total assessed value of the Oregon and California grant lands in each of said counties for the year 1915 bears to the total assessed value of all of said lands in the State of Oregon for said year, such moneys to be used as other county funds.

(b) Twenty-five per centum to said counties as money in lieu of taxes accrued or which shall accrue to them prior to March 1, 1938, under the provisions of the Act of July 13, 1926 (44 Stat. 915), and which taxes are unpaid on said date, such moneys to be paid to said counties severally by the Secretary of the Treasury of the United States, upon certification by the Secretary of the Interior,

until such tax indebtedness as shall have accrued prior to March 1, 1938, is extinguished.

From and after payment of the above accrued taxes said 25 per centum shall be accredited annually to the general fund of the Treasury of the United States until all reimbursable charges against the Oregon and California land-grant fund owing to the general fund in the Treasury have been paid: *Provided,* That if for any year after the extinguishment of the tax indebtedness accruing to the counties prior to March 1, 1938, under the provisions of Forty-fourth Statutes, page 915, the total amount payable under subsection (a) of this title is less than 78 per centum of the aggregate amount of tax claims which accrued to said counties under said Act for the year 1934, there shall be additionally payable for such year such portion of said 25 per centum (but not in excess of three-fifths of said 25 per centum), as may be necessary to make up the deficiency. When the general fund in the Treasury has been fully reimbursed for the expenditures which were made charges against the Oregon and California land-grant fund said 25 per centum shall be paid annually, on or after June 30, to the several counties in the manner provided in subsection (a) hereof.

(c) Twenty-five per centum to be available for the administration of this Act, in such

annual amounts as the Congress shall from time to time determine. Any part of such per centum not used for administrative purposes shall be covered into the general fund of the Treasury of United States: *Provided,* That moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the Oregon and California land-grant fund mentioned in subsection (b) so long as any such charges shall exist.

All acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act.

Approved, August 28, 1937.

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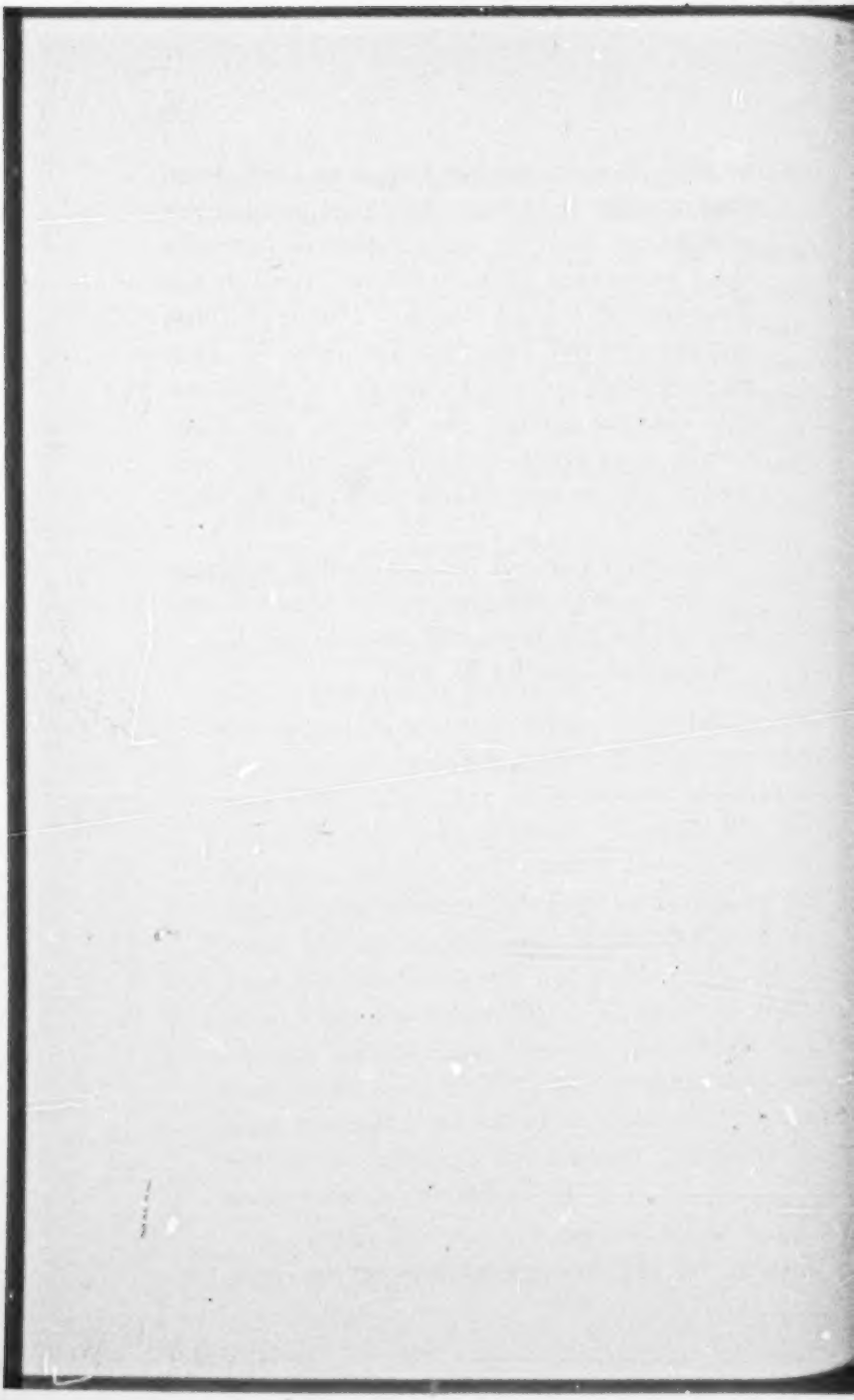

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No. 604

In The

Supreme Court of the United States

October Term, 1954

Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture,
Petitioners,

v.

Clackamas County, Oregon,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

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No. 604

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Clackamas County, Oregon,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT

By the Acts of July 25, 1866 (14 Stat. 239); June 25, 1868 (15 Stat. 80); April 10, 1869 (16 Stat. 47) and May 4, 1870 (16 Stat. 94), Congress granted more than 3,000,000 acres of land in western Oregon to the Oregon & California Railroad Company to aid in the construction of a railroad and telegraph line southward from Portland to the California border. The granting acts provided that the lands should be sold by the railroad to actual settlers in tracts not greater than 160 acres to any one settler and for prices not exceeding $2.50 per acre. Title to the lands became vested in the railroad company by 1870 (R. 3, 4, 37)

The primary grant included each alternate odd numbered section of public land, non-mineral in character, for

10 miles on each side of the railroad right of way not previously reserved, occupied by settlers, or otherwise disposed of. For lands reserved, occupied or previously disposed of the railroad company was authorized to select other odd numbered sections not more than 10 miles beyond the limits of the primary grant. These lands are popularly known as "lieu lands" or "indemnity lands". (R. 37)

For nearly 40 years the railroad company violated the terms of the grant by refusing to sell the lands to actual settlers and by selling in quantities greater than 160 acres and for prices exceeding $2.50 per acre (R. 4, 37, 40, 49)

In 1907 an actual settler brought a suit in the United States District Court for the District of Oregon to compel the sale to him in accordance with the granting acts of a quarter section of the lands. The United States entered the litigation and demanded a forfeiture of all the unsold lands to the Government. (R. 4) The District Court, in 1915, decreed forfeiture (186 Fed. Rep. 861), but the Supreme Court of the United States reversed that judgment, holding in effect that there could be no forfeiture, and that

> "• • • we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroad." (238 U. S. 393, 411, 59 L. Ed. 1360, 1397)

By the Act of June 9, 1916 (39 Stat. 218), the Congress provided that title to all unsold grant lands, patented or

unpatented, shall be "revested" in the United States. The Act directed the Attorney General to bring a suit "to have determined" the amount of money the railroad company had received on account of any of the granted lands which should be charged against the railroad as part of the "full value" secured to it by the granting acts. (R. 5, 38)

That Act further provided for classification of the lands, sale of the timber therefrom for cash, establishment in the Treasury of "The Oregon and California land-grant fund", directed the deposit therein of all revenues derived from the revested lands, and, in effect, directed payment therefrom to the State of Oregon and the eighteen Oregon counties in which the lands are located, after payment of the amounts due the railroad company and accumulated taxes, of 75 per cent of such revenues and the use of the remaining 25 per cent for administration expenses. Jurisdiction over the revested lands was placed in the Secretary of the Interior, who was directed to determine and certify to the Secretary of the Treasury the several amounts to be paid from "The Oregon and California land-grant fund" (R. 38, 39, 44)

By the Act of August 28, 1937 (50 Stat. 874) Congress provided that the revested lands

> "• • • shall be managed • • • for *permanent* forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a *permanent* source of timber supply, protecting watersheds, regulating stream flow, and *contributing to the economic stability of local communities and industries,* and providing recreational facilities • • •" (Emphasis added)

The Act continued the administration of the land in the Department of the Interior, and for the payment of 75

per cent of the revenues to the counties wherein the lands are located and the use of 25 per cent for administration expenses. (R. 46)

The suit brought by the Attorney General under the 1916 Act resulted in a final judgment being entered therein in 1925 by the United States District Court for the District of Oregon. (R. 6, 7, 42, 43, 44)

The Act of March 3, 1891 (26 Stat. 1095) authorized the President to establish forest reserves "in any part of the public lands". By proclamations, the President, in 1892 established the Bull Run Forest Reserve, and in 1889 the Cascade Range Forest Reserve. Included within the exterior boundaries of those forest reserves were certain unpatented lands previously granted to the railroad company within the "lieu land" or "indemnity" portion of the grant. In the suit brought under the 1916 Act, the Court found in part as follows:

> "Item 13(k) involves the inquiry touching whether the railroad company should have credit for the 472,000 acres comprised thereby. These lands lie within the indemnity limits of the grant, and were included within the limits of national forest reserves by the proclamation of the President. * * * The lands, by reason of the deficiency, as we have seen in our examination of item 13(i), had previously and necessarily become appropriated to meet the losses sustained to the place grant. They were not at that time a part of the public domain, and were unsusceptible of appropriation by the Government. It results that the railroad company is entitled to credit for the whole of the acreage comprised by item 13(k)" (R. 7, 42, 43)

By statute the Forest Service of the Department of Agriculture administers the national forest lands while the Department of the Interior administers other public lands, including the revested Oregon & California railroad grant lands.

Because the 472,000 acres mentioned were within the exterior boundaries of the forest reserves, there arose a controversy between the Department of the Interior and the Department of Agriculture as to which should administer the lands involved in Item 13(k).

Although the United States District Court for the District of Oregon specifically held that the lands were Oregon and California railroad grant lands and at the time of the establishment of the national forests mentioned were not susceptible of appropriation, the Department of Agriculture refused to abide by the court's decision and insisted that it had jurisdiction over the lands. In 1942, the two departments, by an exchange of memoranda, agreed:

> "1. The Forest Service will make sales of timber from the O. and C. lands in controversy.
>
> "2. The money from such sales is to be put in escrow for distribution when the controversy has been resolved.
>
> "3. This is not to be construed * * * as a yielding on our part or yours of jurisdiction as to these lands." (R. 31.)

A separate account was established in the Treasury known as "Deposit Fund Account 12X6875.110, Suspense Agriculture (Forest Service)", in which revenues from the lands have been deposited since 1942." (R. 29) As of June 30, 1954, the amount in that account was $7,695,498.12, of which the 18 Oregon land grant counties, including Clackamas County, in which the lands are located are entitled to receive 75 per cent, or $5,771,623.59.

The controversy between the two departments continued for more than eleven years. In November, 1952, Clackamas County brought an action in the United States District Court for the District of Columbia, which resulted in the decision on April 30, 1954, of the United

States Court of Appeals for the District of Columbia Circuit which is involved here. (R. 1-15, 35-70)

After the filing of the action by Clackamas County, then Senator Guy Cordon introduced S. 2225, which became the Act of June 24, 1954 (68 Stat. 270). That bill was pending when the decision of the court below was rendered on April 30, 1954. Senator Cordon succeeded in obtaining a committee hearing (he then being acting chairman) on his bill on May 4, 1954. In his explanation of the bill to the other members of the committee, he said, among other things,

> "This matter has been before the Congress since early in 1941. Your present acting chairman at that time represented the Oregon-California land grant counties as their general counsel and presented this matter numerous times before both houses; he represented all of the counties back in 1926; he represented them in the period between that and 1937; he represented them in 1937 before both Houses when the amendment was made in that year, and thereafter he appeared before both houses in an attempt to settle this particular controversy" (the dispute between the Departments of the Interior and Agriculture as to jurisdiction over the 472,000 acres of lands already mentioned).

Senator Cordon then inserted in the record a list of six bills previously introduced in the United States Senate, all relating to the lands in question. (Hrgs. on S. 2225 before the Committee on Interior and Insular Affairs, May 4, 1954, pp. 3, 4). It is clear, therefore, that until the decision of the court below was rendered, showing how the controversy should be resolved (in fact, resolving it), no legislation by Congress was obtainable. Senator Cordon discussed the decision and said:

> "In the hearings that have been held through the years, the Departments of Agriculture and Interior have continued to contend for jurisdiction, each

claiming that under the law there is no question about its right of jurisdiction. It has seemed to me who had gone into the matter as a lawyer and had examined the precedents, particularly the adjudicated cases, the Department of the Interior had the best case. * * * It seemed to me that the better procedure would be to get the matter determined legislatively by Congress rather than judicially in a court of law. * * *

"Let me say that one of the counties, Clackamas County, a beneficiary under this grant, believed the matter should be determined by litigation and commenced a suit in the Federal court, which reached its culmination last week, or at least one step toward its culmination, in a decree in the Circuit Court of Appeals for the District of Columbia.

"* * * But with the situation in that status as of now, I believe we should go forward with the hearing on this bill, because the bill not only would settle the question of where the money should go, it provides for it to go in the Oregon and California fund as the court has decreed—but also makes final determination of the issue of jurisdiction, which the court decree does not touch." (Hrgs., supra, pp. 4, 5).

REASONS FOR DENIAL OF THE WRIT

(1) The action brought by Clackamas County relates to funds which have been derived from 472,000 acres of lands and to the lands themselves. The petitioners, the two Secretaries, refer to the lands as being "462,000 acres" (Petition, pp. 6, 12, 14). What has become of the additional 10,000 acres involved in the accounting suit brought by the Attorney General under the 1916 Act and embraced in Item 13(k) of Judge Wolverton's decision of 1925 (8 F. 2d 645)? That question can not be answered from the record in this case, and the necessity for the taking of testimony to determine it is apparent. The court decision, therefore, is not moot in that respect.

(2) At page 6 of the petition, the following appears:

> "In view of the prior reservations and long administration of the some 462,000 acres of land here involved as national forest lands, these lands were not administratively considered 'O & C' lands. Accordingly the proceeds therefrom were distributed pursuant to the statute governing the dipsosal of money received from national forests (16 U.S.C. 499-501) under which the counties receive 25%, rather than being distributed as 'O & C' monies."

There is nothing in the record in this case to support or to refute that statement. The legal action, therefore, is not moot in that respect.

(3) Since the United States District Court for the District of Oregon in 1925 definitely determined that the 472,000 acres within the boundaries of the national forests were Oregon and California grant lands, the eighteen Oregon land grant counties were entitled to 75 per cent of the revenues derived therefrom at least from the date of the 1925 decision. From the quoted statement, however, it appears that until the funds began to be impounded in 1942, the land grant counties were paid only 25 per cent of the revenues. If that is correct, they have been deprived of 50 per cent of the revenues for a period of seventeen years. Evidence as to the amount involved should be adduced. That can be done only in a judicial proceeding. This action in that respect is not moot.

(4) Section 1(a) of the Act of June 24, 1954, provides that the impounded funds "shall be disposed of in accordance with the provisions of title II of the Act approved August 28, 1937 (50 Stat. 874) as hereby amended, * * * except that none of the provisions of this Act shall affect revenues heretofore distributed."

The 1916 and 1937 Acts provided, in effect, that the counties should receive 75 per cent of the revenues de-

rived from the lands. As soon as revenues accrued, the rights of the counties became fixed and vested. If the 1954 Act was intended to take away those vested rights, its unconstitutionality is clear. *Fletcher* v. *Peck,* 6 Cranch 87, 3 L. Ed. 162, 177; *Sturges* v. *Carter,* 114 U.S. 521, 29 L. Ed. 240, 243, (quoting from *Society* v. *Wheeler,* 2 Gall. 139; *Neild* v. *District of Columbia,* 71 App. D. C. 306, 314). In order to determine the rights of the counties and the amounts of revenues received from time to time between 1916 and 1942, the taking of evidence is necessary. This action, in that respect, is not moot.

(5) At page 10 of the petition, a suit by counsel for Clackamas County for an attorney fee is mentioned, apparently for the purpose of showing that petitioners have been prevented from distributing all of the funds in the escrow account by that litigation. Even so, determination of that question remains, either in this action or in the fee action mentioned, or both, as they may be consolidated for hearing by the District Court. In that respect this case is not moot, as it is customary in class actions, such as this, for the court to award attorney fees payable from the funds involved in the class litigation.

(6) At pages 11 and 12 of the petition, the two Secretaries state:

> "With respect to (b) (mandamus to compel distribution of the impounded funds), the 1954 Act so changed the distribution formula, and actions taken in compliance with the 1954 Act have so changed the factual situation, that the relief sought in the complaint would now be entirely inappropriate."

There is no evidence in the record as to the "actions taken in compliance with the 1954 Act." Therefore, without knowing what those actions are, who can say that the relief sought in the complaint would be inappropriate? Equity, once having acquired jurisdiction, will

afford relief, and its jurisdiction ordinarily is not defeated by subsequent happenings. *Beedle* v. *Bennett*, 122 U. S. 71, 30 L. Ed. 1074; *Clarke* v. *Wooster*, 119 U. S. 322, 30 L. Ed. 392; *Van Allen* v. *New York, etc. R. R. Co.*, 144 N. Y. 180, 38 N. E. 998. The production of evidence in that regard is necessary. Accordingly, this action in that respect is not moot.

(7) At pages 12 and 13 and in footnote 4 on page 13, the two Secretaries argue that

> "Congress has a right to alter the distribution of undisbursed money derived from the sale of timber from lands belonging to the United States and, since the provisions for the payments to the counties represent a gratuity, they created no vested interest."

Those contentions are contrary to the position of the author of the bill which became the Act of June 24, 1954. At the hearings on May 4, 1954 on his bill, then Senator Cordon said:

> "It has always been the contention of the people of Oregon that the beneficial interest, or equitable title, rested in the State. But the legal title has been in the United States." (Hrgs., supra, p. 14).

Senator Clinton Anderson, formerly Secretary of Agriculture, a member of the Committee on Interior and Insular Affairs, said:

> "What little study I had a chance to give it in the Department of Agriculture, certainly indicated that the land now belonged without question to Oregon as far as benefits from it go and should be used for the benefit of the people of Oregon. • • •
>
> "• • • I think that it belongs to Oregon and the benefits should go to Oregon. • • •" (Hrgs., supra, pp. 12 and 13)

Since Oregon has the beneficial interest if not the legal title in the lands, it has a vested right to its share of

the income. Clearly, therefore, the two Secretaries are wrong when they say that the payments to the counties represent a mere gratuity. They are only receiving the income from their own lands. That certainly is not a gratuity. Therefore, Congress has no right to change the distribution of funds already accrued or the distribution of future income from the lands without the consent of the land grant counties. This action in that respect is not moot.

(5) The two Secretaries also contend in their petition that one of the reasons given by the United States Court of Appeals for the District of Columbia Circuit for refusing to remand the case to the District Court for dismissal as moot was that the amendments to the 1937 Act made by the 1954 Act have not changed the distribution directed by the 1937 Act and is without merit, because the 1954 Act actually does change the distribution. The 1954 Act did not change the 75 - 25 per cent distribution of the funds. That is what the Court of Appeals had in mind, and it was correct. Therefore, "it does not appear that the amendments to the 1937 Act made by Public Law 426 (the 1954 Act, 68 Stat. 270) changed the distribution directed by the 1937 Act."

Also, Senator Cordon, when reminded that his bill did not provide a definite formula for distribution of the funds among the counties, said "That formula is provided by the bill in the act of 1937" (Hrgs., supra, p. 20)

The point presented by the two Secretaries in this respect has little, if any, merit.

CASE NOT SUBJECT TO DISMISSAL AS MOOT

As already pointed out, there are a number of reasons why this action is not moot. The necessity for the pro-

duction of evidence to dispose of material issues is clearly apparent.

Unless the action is entirely moot, it should not be dismissed on that ground.

In the case of

Duke Power Co. v. *Greenwood County,* 299 U. S. 259, 267, 81 L. Ed. 178 (cited and relied upon by petitioners at page 16 of the petition)

the Supreme Court said:

> "Where it appears upon appeal that the controversy has become *entirely* moot, it is the duty of the appellate court to set aside the decree below and to remand the same with directions to dismiss." (Emphasis added).

The Supreme Court reversed the decree of the Circuit Court of Appeals in that case, and remanded the action to the lower court with directions to permit amendment of the pleadings so that the case could be retried on the issues thus presented.

Since this case clearly is not "entirely moot", it should not be dismissed on that ground.

The petitioners also rely on

Public Utility Com. v. *Compania General,* 249 U. S. 425, 63 L. Ed. 687

U. S. Ex rel Norwegian Co. v. *Tariff Com.,* 274 U. S. 106, 71 L. Ed. 949.

United States v. *Munsingwear,* 340 U. S. 36, 95 L. Ed. 36

Brownlow v. *Schwartz,* 261 U. S. 216, 67 L. Ed. 620

United States v. *Anchor Coal Co.,* 279 U. S. 812, 73 L. Ed. 972 (memo).

These cases are entirely different from this action and as precedents have little if any value. In the case of

U. S. Ex rel Norwegian Co. v. *Tariff Comm.*, supra, the action was rendered moot by the haste of the defendants. The case involved a petition for mandamus to compel the Tariff Commission to disclose certain information relating to the cost of producing a commodity on which hearings were held to assist the President in prescribing new tariff rates. That case, therefore, is not a persuasive precedent here.

The Duke Power Company case involved an attempt by an electric company to restrain the defendants from constructing and operating a local electric plant and from issuing bonds and making contracts for that purpose. The Federal Emergency Administrator intervened and set up an agreement between the Government and Greenwood County to make a loan to aid the county in financing its project. In disposing of the case, this Court used the language quoted above to the effect that a case must be "entirely moot" before it becomes the duty of the appellate court to remand the case for dismissal.

The Munsingwear case involved violations of a price-fixing regulation covering commodities sold by the Munsingwear company. The District Court held that the respondent's prices complied with the regulations and dismissed the complaint. The United States appealed, and while the appeal was pending the commodity involved was decontrolled. Naturally, under such circumstances the case became moot.

In the Brownlow case, Mrs. Schwartz filed a petition in the United States District Court for the District of Columbia (then the Supreme Court of the District), praying for a writ of mandamus requiring the Commissioners of the District of Columbia to issue to her a permit to erect a building for business purposes. During the pendency of a petition for writ of error to this Court, the

Commissioners granted the permit and the building was constructed. This Court said:

> "It thus appears that there is now no actual controversy between the parties—no issue on the merits which this Court can properly decide. The case has become moot."

Little intellectual exercise is required to determine the utter lack of application of those cases as precedents in this case. The other case cited, *United States* v. *Anchor Coal Company*, was disposed of by this Court in a memorandum. It is not an authority applicable to the situation involved in this proceeding.

Since the Secretaries in their petition admit that "It is rare that a more controversial matter is presented" (Pet. p. 17), there seems no basis upon which it properly may be said that this case is now moot. In fact, their suggestion that the case be remanded "for dismissal as moot without prejudice to the rights of the respondent in the future with respect to any factual issue which may possibly develop under the present law" contradicts the object of seeking the writ and constitutes an admission that this case actually is not moot.

CONCLUSION

Accordingly, respondent contends that this action is not moot and should not be dismissed on that ground. The action provided for in the opinion of the court

below as it now stands is the only proper course, and the petition for writ of certiorari should be denied.

Respectfully submitted,

A. W. Lafferty,
Richard L. Merrick,
L. Eugene Crampton,
Attorneys for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 604

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, PETITIONERS

v.

CLACKAMAS COUNTY, OREGON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

1. While we do not believe it to be necessary to point out all of the erroneous assertions in respondent's brief in opposition to the petition for a writ of certiorari, we think it advisable to demonstrate the fact that there is no "lost" 10,000 acres as that brief implies (p. 7).

The round figures "462,000 acres" and "472,000 acres" have both been used throughout the dispute to describe the controverted land in question. Indeed, in their brief in the Court of Appeals, petitioners used the figure "472,000 acres" but stated by way of footnote:

> In order to prevent confusion, we have used the figure 472,000 acres as set out in

> the Complaint and which has been used generally in describing the lands in controversy throughout the history of the dispute. However, the area originally reserved as national forest lands has in some instances been decreased by exchanges and patents and we are informed that the total area of the controverted land is now somewhat less than that figure.

Representatives of both the Department of Agriculture and the Department of the Interior state the figure to be 462,731 acres. Hearings, S. Committee on Interior and Insular Affairs, S. 2225, 83d Cong., 2d sess. (1954), pp. 70, 73. A county commissioner of respondent county also uses that figure (*Ibid.*, p. 62), as does the Comptroller General of the United States. Audit Report to the Congress of the United States, Bureau of Land Management, Department of the Interior, for fiscal year ended June 30, 1953, by the Comptroller General of the United States, submitted February 3, 1954, pp. 3, 93, 97. Compare page 10 of that audit report where the round number 463,000 acres is used.

Since it is nearer the above figure and has been used recently by those involved in this litigation, *including present counsel for respondent and one of its county commissioners,* petitioners adopted the round figure 462,000 acres for the purpose of its petition for a writ of certiorari. Hearings, S. Committee on Interior and Insular Affairs, S. 2225, 83d Cong., 2d sess. (1954), pp. 6 (Director, Bureau of the Budget), 8 (Secretary of Agricul-

ture), 10 (Assistant Secretary of the Interior), 20–21 (Mr. Richard L. Merrick, counsel for respondent), 41 (Mr. Bob Jones, County Commissioner, Clackamas County, Oregon).[1]

Moreover, the exact acreage, like the other detailed factors upon which the administrators would calculate the precise amount to be paid to the counties, is irrelevant to this action in the nature of mandamus.

2. While it does not deny that payments have been made under the 1954 Act, as asserted in our petition, respondent seems to attempt to cast some doubt on that fact (pp. 8, 9–10). We reaffirm that such payments have been made in the amounts stated in the petition.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

MARCH 1955.

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[1] A past counsel for respondent and other Oregon counties, Guy Cordon, also used the round numbers "460,000 acres" or "462,000 acres" to describe the lands in question on numerous occasions (2 Hearings, S. Committee on Public Lands & Surveys, S. 275, 78th Cong., 1st sess. (1943), pp. 80, 81; Hearings, H. Committee on Public Lands, H. R. 1688 and S. 275, 83d Cong., 1st and 2d sessions (1943–1944), pp. 56, 58, 59, 97, 98) as did many others. 2 Hearings, S. Committee on Public Lands & Surveys, S. 275, 78th Cong., 1st sess. (1943), pp. 4, 6, 48, 55 (E. L. Pope, County Judge, Clackamas County, Oregon); Hearings, H. Committee on Public Lands, H. R. 1668 and S. 275, 83d Cong., 1st and 2d sessions (1943–1944), pp. 10, 43 (Governor of Oregon), 73, 84, 85, 91, 92, 93, 127, 137. No attempt has been made to pinpoint all such occasions.

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No. 604

IN THE

Supreme Court of the United States

October Term, 1954

DOUGLAS MCKAY, Secretary of the Interior, and
EZRA TAFT BENSON, Secretary of Agriculture,
Petitioners,

v.

CLACKAMAS COUNTY, OREGON

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S PETITION FOR REHEARING

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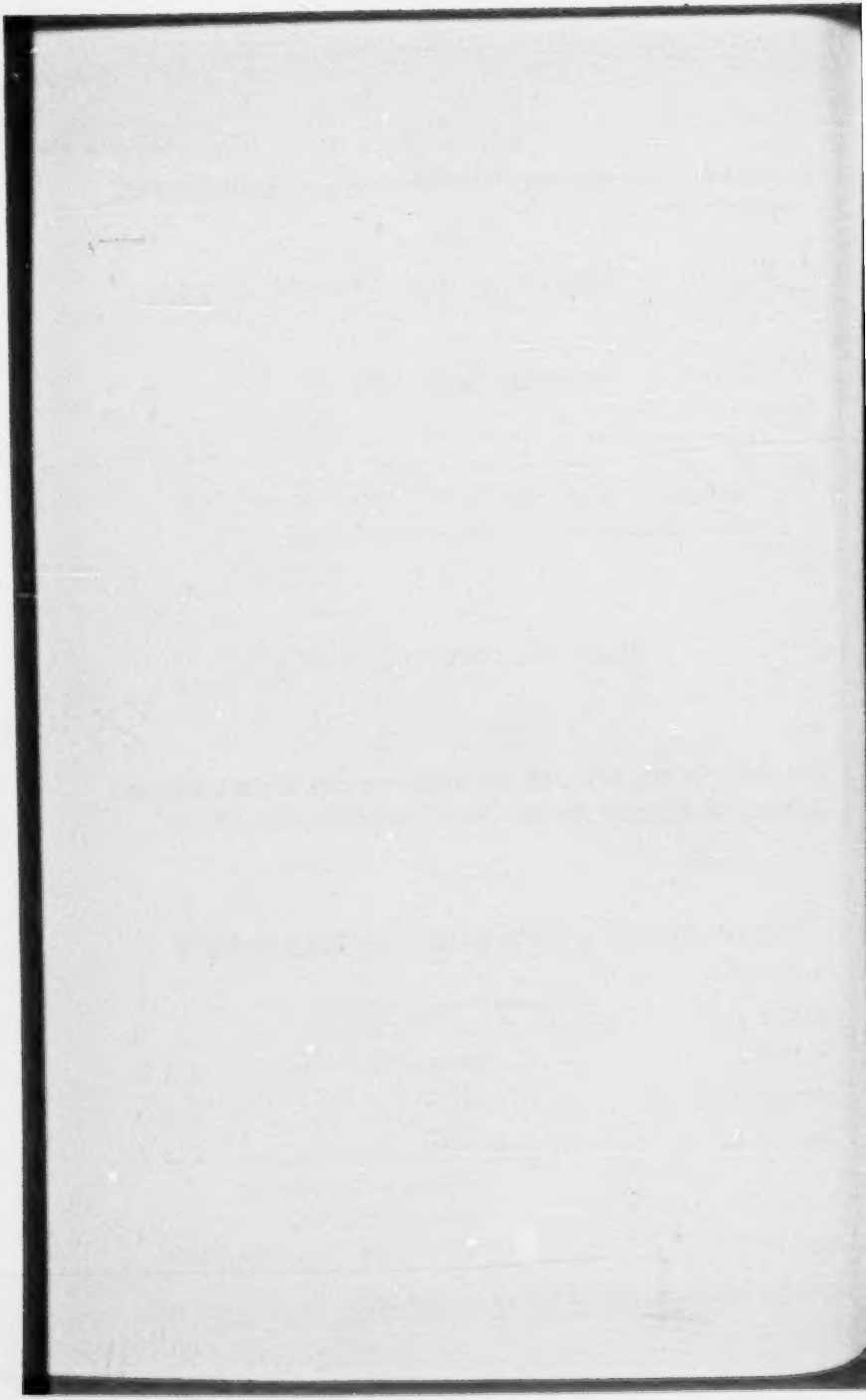

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IN THE

Supreme Court of the United States

October Term, 1954

No. 604

DOUGLAS MCKAY, Secretary of the Interior, and
EZRA TAFT BENSON, Secretary of Agriculture,
Petitioners,

v.

CLACKAMAS COUNTY, OREGON

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S PETITION FOR REHEARING AND FOR ORAL ARGUMENT

Respondent respectfully requests the Court to rehear this case and to permit oral argument, upon the following grounds and for the following reasons:

1. The statute does not afford all the relief to respondent which properly may be granted in this judicial proceeding.

2. Information which has come to the attention of respondent since the petition for certiorari and brief

in opposition thereto were filed establishes facts showing that this proceeding is not moot.

3. Facts stated in the "Reply Memorandum for the Petitioners" are inaccurate and misleading, and the true facts clearly show that this proceeding is not moot.

4. Respondent understood that if certiorari were granted, the entire record in this case in the Circuit Court of Appeals would be certified to this Court, all questions would be briefed, and oral argument thereon would be had. Respondent feels that it has not had a proper hearing in this Court, and that this case is not moot, because all the relief it sought in its action has not been granted.

1. STATUTE FAILS TO AFFORD FULL RELIEF

The Act of June 24, 1954 (68 Stat. 270) provides that ceratin "unpatented odd numbered sections within the indemnity limits of the Oregon and California Railroad land grant authorized by the Act of July 25, 1866 (14 Stat. 239), as amended by the Act of April 10, 1869 (16 Stat. 47), and for which payment was made by the United States to such railroad or its successors in interest under the Act of June 9, 1916 (39 Stat. 218), pursuant to the decree in the case of United States against Oregon and California R. R. Co. (8 F. (2d) 645), which were included within the boundaries of national forests by proclamations of the President of the United States * * * are hereby declared to be revested Oregon and California railroad grant lands * * *."

The statute does not specify the area of said lands. In the case mentioned in the Statute (*U. S.* v. *Oregon & California R. R. Co.,* 8 F 2d 645), the area of the lands is specifically stated to be 472,000 acres. Determination of the precise area of lands involved can be made by evidence only, and a judicial proceeding is considered to be

the proper method and a court the proper forum in which to establish that fact.

The statute further provides:

> "That all revenues hereafter derived from said lands and those revenues heretofore derived from such lands and placed in special deposit account * * * shall be disposed of in accordance with the provisions of title II of the Act approved August 28, 1937 (50 Stat. 874) as hereby amended. * * *"

Without evidence aliunde the Act, there is no way of determining how many acres or how much money are involved in this proceeding.

At the time of the decision in the case referred to above (8 F. 2d 645), there were 472,000 acres of the lands involved. In the briefs of petitioners and other papers, the lands are referred to as containing 462,000 acres. At page 7 of respondent's brief, the query was made as to what had become of the 10,000 acres between the amount originally involved and the amount stated now to be the correct area. To that question, petitioners, in their "Reply Memorandum" attempt to brush off the apparent discrepancy by the mere statement that there is no "lost" 10,000 acres.

In a "Brief of the Department of the Interior on Legal Issues" filed with the Committee on Interior and Insular Affairs of the House of Representatives during hearings on H. R. 6662, a bill "Relating to the Administrative jurisdiction of certain public lands in the State of Oregon" (which is the same title as that of the Act of June 24, 1954, except for the addition to the latter of the words "and for other purposes"), the Chief Counsel of the Bureau of Land Management, Deprtment of the Interior, quoted the testimony of a representative of the Department of the Interior relating to H. R. 5858, 75th Congress, 1st Session, as follows:

> "revested lands included a large area within the indemnity limits of the grant which were then unsurveyed but which were paid for as revested lands, under the decree of the court. This area was subsequently surveyed and found to contain 528,004.18 acres, which has not been cruised or classified." (p. 10 of Brief)

In an official letter from the Department of the Interior, dated April 14, 1955, to one of the County Commissioners of Clackamas County, the following appears:

> "A large acreage of the revested lands was disposed of between 1916 and 1937 under the general land laws and under several special acts of Congress. The major portion of the disposals involved lands which revested after having been patented to the O. and C. Railroad Company. The remainder of the disposals were of lands which revested because the Company was entitled to receive patents to them. This latter class of disposals included a substantial acreage of the indemnity lands within National Forest boundaries. These disposals account for the apparent discrepancies in acreage figures to which you refer in your letter."

The accuracy of these statements is challenged, for the reason that by an executive order dated July 31, 1916, the President directed:

> "• • • in order to facilitate carrying out the provisions of the Act of June 9, 1916, and to protect the interests of the Government, the public, and of the railroad company, all the odd numbered sections within the primary and *indemnity* limits of the grant, and not excepted by the terms thereof, are • • • hereby withdrawn from settlement, *entry*, or *other disposition* until otherwise directed." (Emphasis added)

No other order between 1916 and the date of the Act of August 28, 1937, was issued with repect to restoring the lands to entry or providing for any other disposition.

Therefore, respondent doubts that any such disposals were lawfully made unless specifically directed by Acts of Congress, which does not appear to be the case. Certainly between the date of the decision of the Court in 1925 (8 F. 2d 645), when the so-called controverted lands amounted to 472,000 acres, and enactment of the Act of August 28, 1937, which stopped all disposals, there could not have been a shrinkage of 10,000 acres, and there could have been no disposal under the general lands laws or any other methods, except special acts of Congress, and respondent knows of no such acts.

The lands referred to in the Brief of the Department of the Interior mentioned above are the same lands which are involved in this proceeding. The brief and the letters referred to are believed to be official documents filed with the Committee and the department concerned, of which this Court properly may take judicial notice. If not, then we ask for an opportunity to prove their authenticity in the usual way. Respondent further desires a chance to inquire into and to establish that there were no exchanges which reduced the acreage from 472,000 to 462,000. Furthermore, from the brief the lands comprised 528,000 acres. Respondent feels that it is entitled, as one of the eighteen land grant Counties of Oregon, to know what has become of all the lands, and whether it has been deprived of its rightful share of the income therefrom, as provided by the 1916 and 1937 acts of Congress.

From the foregoing, respondent feels that this Court readily will perceive that this case is not moot, but that further inquiry and the production of evidence are necessary to the proper protection of the rights of respondent and the other land grant counties.

If this case is now moot (which respondent contends is not the fact), it was rendered so by the acts of petitioners in hastily paying out the impounded funds in the

escrow account, after twelve years of inactivity, in the face of the decision of the court below and while this proceeding was pending on motion for rehearing and on petition to this Court for certiorari. The funds also were paid out during the pendency of an action to test the constitutionality of Section 1(a) of the Act of June 24, 1954; namely, No. 12,533, in the United States Court of Appeals for the District of Columbia Circuit, which at the present time is calendared for argument on May 9, 1955. In utter disregard of the outcome of that litigation, as well as this case, the petitioners hastened the distribution of the impounded funds which had accumulated over a period of twelve years awaiting the outcome of a supposed controversy between the Department of the Interior and the Department of Agriculture, which the decision in the court below definitely resolved and determined. Those actions demonstrate the contempt the executive departments of the Government have for pronouncements of the judiciary, as was the case in wholly ignoring Judge Wolverton's decision of 1925 definitely determining the status of the revested lands within the National Forests.

In further demonstration of the uncertainty as to the acreage involved, respondent desires to quote from a letter dated February 15, 1955, which accompanied the Government's check for the amount of the impounded funds distributable to Clackamas County, signed by the Director of the Bureau of Land Management, Department of the Interior, as follows:

> "This requirement brought into the distribution computations not only the *474,000* acres of O. and C. lands in the indemnity strip within National Forests but some 232,000 acres of other O. and C. lands which were not assessed as of 1915. * * *" (Emphasis added.)

This is the first time respondent had any information as to the 232,000 acres mentioned. Also, the figures

"474,000" acres had not theretofore been used. Clearly, therefore, evidence as to the area of the lands involved is required in order to establish definitely the issues involved in this litigation.

2. INFORMATION SUBSEQUENTLY ACQUIRED

A part of the information which has come to respondent's attention since the petition was filed herein has been mentioned already in the preceding remarks relating to the scope of the statute. In addition, attention is invited to the following quotation from the "Audit Report to The Congress of the United States, Bureau of Land Management, Department of the Interior, for the Fiscal year ended June 30, 1953" by the Comptroller General of the United States:

> "The public land records system of the Bureau contains the basic records of use and ownership of the public domain in the 29 public land states and the Territory of Alaska. The present system of land records, with little modification, has been in existence since the early 1800's. Many of the records are in a dilapidated condition. * * * No coordinated action was taken by the Bureau, during the fiscal year 1953 to revise the land records system." (p. 63)

With antiquated records, as indicated by the above quotation, respondent feels certain that errors in the various reports and statements as to the area of the lands involved in this litigation have been made, and that a full judicial inquiry is necessary in order to clarify and establish definitely the issues involved herein.

The information mentioned demonstrates that this litigation is not moot. On the contrary, it emphasizes the necessity of hearings before the trial court in this case.

3. FACTS STATED IN THE "REPLY MEMORANDUM OF PETITIONERS" ARE INACCURATE

From the foregoing, respondent believes the Court readily will perceive that the statements made in Respondent's reply memorandum with respect to there being no "lost" 10,000 acres are inaccurate and misleading, and undoubtedly had considerable effect insofar as the action of this Court in granting certiorari and in holding that this case is moot is concerned. Those statements were intended to have that effect, else they would not have been used by counsel for petitioners. Now that their inaccuracy has been demonstrated, respondent feels that this Court ought to reconsider and reverse its previous action in holding this litigation to be moot.

4. IF CERTIORARI IS GRANTED, RESPONDENT UNDERSTOOD FULL HEARING WOULD BE ACCORDED

Respondent proceeded on the assumption that if the petition for writ of certiorari in this case were granted, the entire record in the court below would be certified to this Court, briefs on the case as a whole would be permitted, and oral argument before the Court would be accorded, as is done in many other cases. In fact, it was respondent's impression that that was the normal and almost universal practice of this Court. In deciding that this litigation is moot on the scanty record before it, respondent feels that it has been denied its day in court in this tribunal. Accordingly, this petition for rehearing has been prepared and filed with the firm belief that respondent is entitled to further consideration and that it ought now to be accorded the right to have the entire record certified to this Court from the court below and

that its attorneys should be permitted to brief the entire case and argue its merits orally before this Court.

Accordingly, respondent respectfully prays that this petition be granted, and that it be accorded the relief indicated above.

Respectfully submitted,

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Citizens Bank Bldg.,
Oswego, Oregon,
Attorneys for Respondent.

CERTIFICATE OF GOOD FAITH.

I, the undersigned, of counsel for respondent herein, hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

RICHARD L. MERRICK,
Of Counsel for Respondent.